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# THE BUSINESS AND ETHICS OF LAYING HENS: CALIFORNIA'S GROUNDBREAKING LAW GOES INTO EFFECT ON ANIMAL CONFINEMENT

VALERIE J. WATNICK\*

**Abstract:** In the United States, most laying hens are routinely subjected to cruel treatment and forced to live in such extreme confinement that they are unable to fully extend their limbs or turn around. In 2008, California took a stand against these inhumane practices by enacting the Prevention of Farm Animal Cruelty Act, also known as Proposition 2, which banned the use of inordinately small “battery cages” to house laying hens. In 2010, California passed an amendment to Proposition 2, requiring all eggs sold within California, regardless of where they are produced, to comply with the new law. Other states have followed California’s lead, passing and implementing state laws that begin to offer some minimal protection to laying hens and other farm animals. The vast majority of states, however, have not followed suit and federal legislation provides abysmally little protection for these animals. This Article argues that there is an ethical obligation—and there should be a legal obligation—to ensure the humane treatment of farm animals. This Article goes on to suggest a framework for new federal legislation to govern the confinement and humane treatment of farm animals.

## INTRODUCTION

Many of us enjoy a good omelet and may even consider an omelet a more humanitarian dining option than a meal based on “full on” animal protein. What you might not know is that the hens that lay most of the eggs for such an omelet, at least in the United States, live in miserable, cramped conditions and never see the “light of day.”<sup>1</sup> Indeed, the cages used for most of the over 300

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<sup>1</sup> See Amy Mosel, Comment, *What About Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133, 186 (2001); see also Sheila Rodriguez, *The Morally Informed Consumer: Examining Ani-*

million hens in the United States, commonly called “laying hens,” provide each hen an amount of space that is about the size of a laptop computer.<sup>2</sup>

In 2008, California voters approved Proposition 2, the “Prevention of Farm Animal Cruelty Act” (“Proposition 2” or the “Act”), banning the use of these inordinately small “battery cages,” effective January 2015.<sup>3</sup> California hen enclosures are now required to provide enough space for hens to stand up, lie down, turn around freely, and fully extend their limbs.<sup>4</sup> In 2010, the California legislature extended these requirements by passing an amendment to Proposition 2 (the “2010 Amendment”) requiring all egg producers wishing to sell eggs in California—both within and outside the state—also to comply by January 2015.<sup>5</sup>

The 2010 Amendment created quite a stir<sup>6</sup> and resulted in litigation to halt the enforcement of Proposition 2 and the corresponding 2010 Amendment.<sup>7</sup> Egg producers in Missouri argued that California had placed unfair and unconstitutional limitations on interstate commerce.<sup>8</sup> In the lawsuit (the “Missouri Complaint”), the State Attorneys General from Missouri, Nebraska, Alabama, Oklahoma, Kentucky, and Iowa urged that the cost of complying with the 2010 Amendment’s new caging systems would raise their producers’ egg prices and destroy a ready market in violation of the Commerce Clause.<sup>9</sup> The Missouri Complaint also urged that if the egg producers outside of California were to abandon the California market, surpluses in their own states would lower egg prices and drive farmers out of business.<sup>10</sup> Finally, the Complaint alleged that the 2010 Amendment was preempted by uniform national egg standards under the Federal Egg Products Inspection Act.<sup>11</sup>

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*mal Welfare Claims on Egg Labels*, 30 TEMP. J. SCI. TECH. & ENVTL. L. 51, 52 (2011) (describing the poor conditions under which United States laying hens are raised).

<sup>2</sup> Rodriguez, *supra* note 1, at 51, 56, 67 (noting that cage sizes vary, but a typical size is twelve by twenty inches in which anywhere from one to five layers are housed). Clinical Professor of Law Sheila Rodriguez devotes her paper to examining the conditions under which hens are raised to provide eggs, including those labeled humane, Grade AA, Cage Free, Antibiotic Free, and Organic. *See id.* Professor Rodriguez urges that “from a moral and a legal standpoint, consumers should avoid purchasing most eggs.” *Id.* at 51; *see infra* notes 191–218 and accompanying text.

<sup>3</sup> *See* CAL. HEALTH & SAFETY CODE §§ 25990–25994 (West 2015).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* § 25996.

<sup>6</sup> *Koster Picks up King’s Fight, Files Lawsuit Against CA Hen Standards*, AGRI-PULSE [hereinafter *Koster Picks up King’s Fight*], <http://www.agri-pulse.com/Koster-picks-up-Kings-fight-files-lawsuit-against-CA-hen-standards-02052014.asp> [<http://perma.cc/D2XF-TFE7>].

<sup>7</sup> Complaint at 19–20, *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014) (No. 2 Civ. 341); *Koster Picks up King’s Fight*, *supra* note 6.

<sup>8</sup> Complaint, *supra* note 7, at 3–4.

<sup>9</sup> *Id.* at 2–4; *Five States Join Missouri in Egg Lawsuit*, FEEDSTUFFS (Mar. 6, 2014), <http://feedstuffs.com/story-nebraska-joins-missouri-egg-lawsuit-45-109587> [<http://perma.cc/EB9M-8ETV>].

<sup>10</sup> Complaint, *supra* note 7, at 3–4.

<sup>11</sup> *Id.* at 3.

The United States District Court for the Eastern District of California's Justice Kimberly Mueller recently put an end to the uproar.<sup>12</sup> She threw out the suit, holding that the Attorneys General lacked standing to sue on behalf of a small number of egg producers in their respective states.<sup>13</sup> Judge Mueller also admonished the complainants not to return on this matter anytime soon, ruling that the suit could not be amended.<sup>14</sup>

California faced similar backlash in 2012, when the state banned the force-feeding of birds to produce foie gras.<sup>15</sup> That ban likewise prohibited the in-state sale of foie gras produced by force-feeding birds, even if produced outside of California.<sup>16</sup> Two non-California foie gras producers, Association des Éleveurs de Canards et d'Oies du Québec and Hudson Valley Foie Gras LLC ("HVFG"), brought a lawsuit against California.<sup>17</sup> As in the lawsuit challenging Proposition 2 discussed above, the foie gras producers argued that California's ban illegally restricted interstate commerce.<sup>18</sup> The United States Court of Appeals for the Ninth Circuit similarly rejected that argument, finding that the statute had only indirect effects on interstate commerce, that California's foie gras ban did not discriminate against private producers based on location, and that the state had enacted the law for the genuine purpose of reducing animal cruelty.<sup>19</sup>

As with the ban on force-feeding birds, California's Proposition 2 was likewise enacted to reduce animal cruelty.<sup>20</sup> In addition to regulating the production of all eggs sold in California, it also applies to and creates better living conditions for all "covered" animals raised in California, including pigs and

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<sup>12</sup> Harris, 58 F. Supp. 3d at 1079; Jacob Bunge, *Judge Upholds California Law Requiring More-Humane Housing of Hens*, WALL ST. J. (Oct. 3, 2014), <http://online.wsj.com/articles/judge-upholds-california-law-on-more-humane-housing-of-hens-1412353791>.

<sup>13</sup> Harris, 58 F. Supp. 3d at 1074–75.

<sup>14</sup> *Id.* at 1077–78. In February 2015, the United States Court of Appeals for the Ninth Circuit likewise affirmed a district court's dismissal of a farmer's suit under Proposition 2. Cramer v. Harris, 591 F. App'x 634, 635 (9th Cir. 2015). The farmer claimed that Proposition 2 was too vague because it did not state the exact dimensions required for each chicken. *Id.*; see also Carla Hall, *Egg-Laying Hens in California Win Another Court Battle*, L.A. TIMES (Feb. 4, 2015), <http://www.latimes.com/opinion/opinion-la/la-ol-egg-hens-california-court-20150204-story.html> [<http://perma.cc/AZ8A-QFX7>] (highlighting the Ninth Circuit's decision to uphold the California law).

<sup>15</sup> See CAL. HEALTH & SAFETY CODE § 25981 (West 2015). See generally Max Shapiro, Note, *A Wild Goose Chase: California's Attempt to Regulate Morality by Banning the Sale of One Food Product*, 35 LOY. L.A. INT'L & COMP. L. REV. 27 (2012) (articulating the domestic and international legal implications of California's foie gras ban).

<sup>16</sup> See HEALTH & SAFETY § 25982.

<sup>17</sup> Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris, 729 F.3d 937, 942–43 (9th Cir. 2013).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 948, 952 (discussing how California has a legitimate interest in preventing animal cruelty and how the ban is a means of advancing that interest).

<sup>20</sup> See HEALTH & SAFETY § 25990.

calves.<sup>21</sup> The measure thus has the potential to influence large producers' treatment and farming methods as to all "covered" animals, in addition to laying hens.<sup>22</sup> It also has the potential to encourage egg producers nationwide to comply with California law as to all their laying hens, rather than create patchwork state-by-state production plans.<sup>23</sup>

In light of this activist history in California, the legal challenges it has spawned, and the groundbreaking nature of California's new animal confinement provisions, this Article examines California's Proposition 2 and the corresponding 2010 Amendment and the battle over them as a backdrop to our ethical and legal obligations to the animals that produce our food. Part I discusses existing widespread practices in the laying hen industry and the conditions under which most laying hens are forced to live.<sup>24</sup> Part II discusses the limited current federal laws addressing farm animal welfare and past agreements and proposals to change federal law in this area.<sup>25</sup> Part III of this Article examines the detail and history of California's Proposition 2, along with current developments in other state laws regarding farm animal confinement.<sup>26</sup> This paper then compares U.S. law regarding laying hens to European law in Part IV and compares and examines the treatment of hens for organic egg production under the Federal Organic Foods Production Act in Part V.<sup>27</sup> In line with what many call this "watershed" animal rights legislative movement, Part VI urges that we have an ethical—and ought to have a legal—obligation to make the farming of animals a more humane business in all states, not just as

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<sup>21</sup> *Id.* The 2010 Amendment, which extends Proposition 2 to eggs produced outside of California but for sale in California, applies only to egg-laying hens and not other "covered animals" under Proposition 2. *Id.* (defining "covered animals" as "any pig during pregnancy, calf raised for veal, or egg-laying hen who is kept on a farm"); *id.* §§ 25991, 25996.

<sup>22</sup> *See id.* §§ 25990–25994.

<sup>23</sup> *See* David Kesmodel, *Latest Flap on Egg Farms: Whether to Go 'Cage-Free,'* WALL ST. J. (Mar. 11, 2015), <http://www.wsj.com/articles/latest-flap-on-egg-farms-going-whole-hog-on-cage-free-1426100062>. For example, Rose Acre Farms in Indiana, one of the largest egg producers in the United States, has stated that it will go cage free in all of its new facilities as it upgrades existing systems. *Id.*

<sup>24</sup> *See infra* notes 30–88 and accompanying text.

<sup>25</sup> *See infra* notes 89–120 and accompanying text.

<sup>26</sup> *See infra* notes 121–147 and accompanying text.

<sup>27</sup> Organic Foods Production Act of 1990 §§ 2102–2123, 7 U.S.C. §§ 6501–6522 (2012); *see* Editorial, *California's Smart Egg Rules*, N.Y. TIMES (Mar. 8, 2014), [http://www.nytimes.com/2014/03/09/opinion/sunday/californias-smart-egg-rules.html?\\_r=0](http://www.nytimes.com/2014/03/09/opinion/sunday/californias-smart-egg-rules.html?_r=0) (noting that the European Union banned the use of battery cages in 2012); *infra* notes 148–190 and accompanying text.

to laying hens, and not just in California.<sup>28</sup> Finally, Part VII suggests a framework for federal farm animal confinement and treatment law.<sup>29</sup>

## I. THE LAYING HEN BUSINESS IN THE UNITED STATES

### A. *What Is It Like to Be a Laying Hen in the United States?*

In 2013, nearly eighteen million California hens laid 5.4 billion eggs at a commercial value of \$380 million.<sup>30</sup> Almost all of these hens were confined to cages with 67–86 square inches of space per hen.<sup>31</sup> To get an idea of how small a space this is, consider a small laptop at ten inches by seven inches. Such a small computer would be just shy of the approximate lifetime living space for an average laying hen.<sup>32</sup> In this limited space, hens have extreme difficulty and are largely unable to stand up, turn around, or extend their limbs.<sup>33</sup> The United Egg Producers (“UEP”) animal husbandry guidelines (“UEP Guidelines”) justify these limited space requirements by stating that “[s]cience has shown that additional space may be more stressful (for hens) as more aggressive tendencies become manifest.”<sup>34</sup> The confinement, however, creates its own stressors by preventing hens from engaging in natural tendencies such as dust bathing, foraging, and nesting.<sup>35</sup> Confinement is the most significant contributor to frustration for battery-caged hens, because it prevents them from exercising these tendencies.<sup>36</sup>

The cruelty of battery caging has implications for these factory farmed hens beyond just crowded living quarters. When hens are confined to small

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<sup>28</sup> Deena Shanker, *The U.S. Egg Industry Is Losing Its Fight to Keep Chickens in Cages*, QUARTZ (Sept. 21, 2015), <http://qz.com/506833/the-us-egg-industry-is-losing-its-fight-to-keep-chickens-in-cages/> [<http://perma.cc/HLH4-ZCJH>]; see Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 150 (2009) (“Approximately 95% of hens in U.S. factory farms are intensively confined in small, wire ‘battery cages,’ stacked several tiers high and extending down long warehouses.”); *infra* notes 191–268 and accompanying text.

<sup>29</sup> See *infra* notes 269–279 and accompanying text.

<sup>30</sup> CAL. EGG INDUS. ASS’N, COMMODITY FACT SHEET: EGGS (2014), <http://www.cfaitec.org/factsheets/pdf/Eggs.pdf> [<http://perma.cc/77TJ-E762>].

<sup>31</sup> See Yan Heng et al., *Consumer Attitudes Toward Farm-Animal Welfare: The Case of Laying Hens*, 38 J. AGRIC. & RESOURCE ECON. 418, 418 (2013), <http://www.waeaonline.org/UserFiles/file/JAREDec2013Hengpp418-434.pdf> [<http://perma.cc/6ZKL-3UR6>]; Lovvorn & Perry, *supra* note 28, at 152.

<sup>32</sup> Heng et al., *supra* note 31, at 418; Lovvorn & Perry, *supra* note 28, at 152.

<sup>33</sup> See Elizabeth R. Springsteen, *A Proposal to Regulate Farm Animal Confinement in the United States and an Overview of Current and Proposed Laws on the Subject*, 14 DRAKE J. AGRIC. L. 437, 454 (2009).

<sup>34</sup> See UNITED EGG PRODUCERS, ANIMAL HUSBANDRY GUIDELINES FOR U.S. EGG LAYING FLOCKS 21 (2014) [hereinafter UEP GUIDELINES], <http://www.unitedegg.org/information/pdf/UEP-Animal-Welfare-Guidelines-2014.pdf> [<http://perma.cc/7LE2-6QPW>].

<sup>35</sup> Ian J.H. Duncan, *The Pros and Cons of Cages*, 57 WORLD’S POULTRY SCI. J. 381, 385 (2001).

<sup>36</sup> *Id.*

spaces, they tend to peck and injure each other as a survival instinct.<sup>37</sup> Battery caging induces this violent behavior, as hens do not attack one another under more humane and spacious living conditions.<sup>38</sup> Indeed, hens are social and intelligent animals known to have strong family ties and language abilities in humane settings.<sup>39</sup>

Beak trimming is the common industry practice to address antagonistic behavior in hens confined to battery cages or other small spaces.<sup>40</sup> The UEP, the trade association representing ninety-five percent of egg producers in the United States, has established guidelines for the process.<sup>41</sup> The procedure involves using an automated beak trimmer to trim the tip of the beak on chicks less than ten days old.<sup>42</sup> The process, usually performed without anesthesia, involves trimming and damaging a layer of sensitive tissue between the bone and tip of the beak, causing the hen severe acute and chronic pain.<sup>43</sup> Treated hens then engage in less natural beak-related behavior for up to six weeks after the procedure, further contributing to the stress, pain, and frustration of these hens.<sup>44</sup>

Adding to the evidence that such strict confinement has negative implications for laying hens, the lifespan of factory farmed hens enduring such harsh conditions is one to two years, well short of the twenty-year life span of the egg-laying hens living in more humane conditions.<sup>45</sup>

Additionally, battery-caged hens suffer terribly in factory farming operations. They can become stuck in wire caging, sometimes between the egg conveyor belt and cage.<sup>46</sup> When handlers do not help such trapped birds, they are then left there without food or water to die in this position.<sup>47</sup> In fact, such trapped birds were readily visible in the footage of a documentary film shot by Mercy for Animals, a nonprofit animal rights group, shortly before Californi-

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<sup>37</sup> KAREN DAVIS, PRISONED CHICKENS POISONED EGGS: AN INSIDE LOOK AT THE MODERN POULTRY INDUSTRY 67 (1996).

<sup>38</sup> *Id.*

<sup>39</sup> *The Hidden Lives of Chickens*, PETA, <http://www.peta.org/issues/animals-used-for-food/factory-farming/chickens/hidden-lives-chickens/> [<http://perma.cc/Z6DK-225R>]; see also *ALDI: Stop Contributing to Cruelty and Commit to Cage Free*, RSPCA, <http://www.rspca.org.au/aldi> [[perma.cc/BVD8-5A9S](http://perma.cc/BVD8-5A9S)].

<sup>40</sup> DAVIS, *supra* note 37, at 67.

<sup>41</sup> *About Us*, UNITED EGG PRODUCERS, <http://unitedegg.org/> [<http://perma.cc/8AZY-5VMB>].

<sup>42</sup> See UEP GUIDELINES, *supra* note 34, at 9.

<sup>43</sup> See Jessica Braunschweig-Norris, Note, *The U.S. Egg Industry—Not All It's Cracked up to Be for the Welfare of the Laying Hen: A Comparative Look at United States and European Union Welfare Laws*, 10 DRAKE J. AGRIC. L. 511, 519–21 (2005).

<sup>44</sup> Christoph Menke et al., *Mutilations in Organic Animal Husbandry: Dilemmas Involving Animal Welfare, Humans and Environmental Protection*, in ANIMAL HEALTH AND WELFARE IN ORGANIC AGRICULTURE 163, 173 (Mette Vaarst et al. eds., 2004).

<sup>45</sup> Mosel, *supra* note 1, at 146–47.

<sup>46</sup> *Id.* at 146.

<sup>47</sup> See *id.*

ans passed Proposition 2.<sup>48</sup> Moreover, handlers could be seen swinging birds to break their necks, and then tossing a live bird—neck broken—on a pile of dead hens.<sup>49</sup>

If a laying hen survives to the end of her useful life, when she no longer produces eggs, the hen is typically then transported in a truck to a slaughterhouse.<sup>50</sup> Often over long hauls, the hen is without protection from the elements and without food or water.<sup>51</sup> She is then fastened upside down and fully awake on a conveyor belt until it is her turn to have her throat cut with a knife.<sup>52</sup>

In addition to the fact that battery cages and associated practices inflict miserable and inhumane conditions upon these hens, such conditions also cause higher rates of egg contamination and create health risks for the consumer.<sup>53</sup> Battery-caged hens commonly develop prolapsed uteruses that go untreated.<sup>54</sup> In addition to being a painful and bloody condition, hens with these open wounds produce bloodied eggs, which then move forward for processing on egg conveyer belts.<sup>55</sup> Additionally, Salmonella infection occurs at a higher rate among battery-caged hens than cage-free flocks.<sup>56</sup> Due to their confinement in tiny spaces, these caged hens are forced to defecate, eat, sleep, and lay eggs in the same area. The hens are thus more likely to spread disease to other hens due to their close proximity.<sup>57</sup> Furthermore, vaccination efforts to reduce the occurrence of Salmonella are less effective on battery-caged hens.<sup>58</sup> For these reasons, battery caging has contributed to the 50,000 to 110,000 Salmonella-infected egg sicknesses that occur yearly in the United States.<sup>59</sup>

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<sup>48</sup> *Undercover at a California Factory Egg Farm*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/norco> [<http://perma.cc/5Q75-MPY2>].

<sup>49</sup> *See id.*

<sup>50</sup> *See* Rodriguez, *supra* note 1, at 57.

<sup>51</sup> *Id.*

<sup>52</sup> *See id.*

<sup>53</sup> *Other Health Risks of the Meat Industry*, PETA, <http://www.peta.org/issues/animals-used-for-food/health-risks-meat-industry/> [<http://perma.cc/MB35-Q3B5>].

<sup>54</sup> *See Farm Animal Welfare: Chickens*, MSPCA-ANGELL, <http://www.mspca.org/programs/animal-protection-legislation/animal-welfare/farm-animal-welfare/factory-farming/chicken/eggs.html> [<http://perma.cc/LA86-V7SV>]; *see also* *Factory Farms: A Closer Look at Animals on Factory Farms*, ASPCA, <http://www.aspc.org/fight-cruelty/farm-animal-cruelty/birds-factory-farms> [<http://perma.cc/8NMP-ASJR>] (describing the miserable conditions birds suffer on factory farms). Sick hens are often left to die a slow and painful death. *Factory Farms: A Closer Look at Animals on Factory Farms*, *supra*. Laying hens that stop producing are often proscribed a two-week starvation diet, which causes forced molting and then a brief renewed period of productivity before slaughter. *Id.*

<sup>55</sup> *See Undercover at a California Factory Egg Farm*, *supra* note 48.

<sup>56</sup> *See* Lovvorn & Perry, *supra* note 28, at 152.

<sup>57</sup> *Id.*

<sup>58</sup> Robert Davies & Mark Breslin, *Observations on Salmonella Contamination of Eggs from Infected Commercial Laying Flocks Where Vaccination for Salmonella Enterica Serovar Enteritidis Had Been Used*, 33 AVIAN PATHOLOGY 133, 133–44 (2004), <http://www.tandfonline.com/doi/pdf/10.1080/03079450310001652040> [<https://perma.cc/TNMF-PFG8>].

<sup>59</sup> *See* Lovvorn & Perry, *supra* note 28, at 152–53.



Moreover, there are broader ethical implications of factory farming egg-laying hens in that neither egg laying operations nor broiler chicken farms have use for male chicks, so they are disposed of soon after birth.<sup>60</sup> Methods of disposal are quite alarming: “Common methods used to dispose of unwanted male chicks include maceration; carbon monoxide poisoning; cervical dislocation or manually dislocating the spinal column from the skull; or suffocation.”<sup>61</sup>

Although the UEP animal Guidelines contain provisions for bird euthanasia and on-farm depopulations of entire flocks, the euthanasia standards within these guidelines apply to only sick or injured birds, “spent hens,” and the emergency depopulation of an entire flock.<sup>62</sup> Indeed, the UEP Guidelines for laying hens, intended to be “science-based guidelines to improve the welfare of laying hens,” are silent on the treatment of male chicks.<sup>63</sup> These provisions do, however, call for training and regular evaluation of involved workers, and specify that methods used to cause death “must lead to either rapid death or rapid loss of consciousness and that workers involved must also have regular evaluation.”<sup>64</sup> They further specify that if death is not rapid, it must be induced in a manner that does not cause pain or panic.<sup>65</sup> Additionally, before they are disposed of, birds must be confirmed dead.<sup>66</sup> The UEP also provides specific guidelines for the use of killing systems using carbon dioxide gas to kill birds.<sup>67</sup>

Despite such guidelines seemingly requiring humane euthanasia for laying hens, farmers may not always follow these guidelines, and punishment from state and federal animal cruelty laws is largely lacking.<sup>68</sup>

It is thus not surprising that extreme instances of cruelty in the egg production industry have been documented.<sup>69</sup> In 2000, an egg farmer closed his

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<sup>60</sup> See Rodriguez, *supra* note 1, at 57.

<sup>61</sup> See *id.*; *Macerate*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/macerate> [<http://perma.cc/W8M2-9XVM>] (defining maceration as “to cause to become soft or separated into constituent elements by or as if by steeping in fluid”).

<sup>62</sup> UEP GUIDELINES, *supra* note 34, at 13–15 (defining “spent hens” as hens that have reached an age where they are no longer profitable for slaughter or laying eggs).

<sup>63</sup> See *id.* at 3.

<sup>64</sup> *Id.* at 13–14 (“All workers should be trained on euthanasia and this training should include information about the ability of hens to experience pain and fear, the risk of bone fractures when handling spent hens, proper use of equipment methods of identifying unconsciousness and death, worker safety, biosecurity procedures, and proper carcass disposal.”).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 14–15 (listing additional points that should be observed when introducing carbon dioxide gas to kill birds).

<sup>68</sup> See Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 92–97 (2011).

<sup>69</sup> *Id.*; see *Undercover at a California Factory Egg Farm*, *supra* note 48 (documenting multiple cases of animal cruelty involving farmed animals).

battery-egg production and abandoned 50,000 hens on his farm in Washington State.<sup>70</sup> After weeks without water or food, hundreds of hens passed away before a local reporter exposed the inhumane treatment.<sup>71</sup> The abandonment also led to an environmental disaster, because a slurry of manure, blood, and shell-less eggs from the farm polluted a local creek and eventually caused an E. coli outbreak in a nearby lake.<sup>72</sup> Similarly, in Missouri in 2005, thousands of “spent hens,” or hens that had reached an age where they were no longer profitable for slaughter or laying eggs, were reportedly disposed of in a dumpster while still alive.<sup>73</sup>

### *B. Economics of Non-Cage Production of Eggs*

Prior to the adoption of Proposition 2 and the corresponding 2010 Amendment, a 2008 University of California Agricultural Issues Center Report (the “Report”) predicted that if and when egg production in California shifted to a non-cage system, egg prices would rise by 25% and that the cost of production would rise by 20%.<sup>74</sup> The Report essentially urged that California’s Proposition 2 would put California egg producers out of business.<sup>75</sup>

Yet data within the Report seem to controvert these findings.<sup>76</sup> The Report found that the average per capita egg consumption hovered around seventy eggs per year, or 1.34 eggs per week.<sup>77</sup> A family of four would thus consume about 5.36 eggs a week, or one dozen eggs every two weeks.<sup>78</sup> In 2008, the average cost of a dozen eggs was \$1.67.<sup>79</sup> Were prices to rise by 25%, as predicted in the Report, the additional cost for a family of four to support the use of non-cage egg farming would be 42 cents on a bi-weekly basis.<sup>80</sup> an increase so negligible that it would not be likely to affect egg buying habits.

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<sup>70</sup> Leahy, *supra* note 68, at 93.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> PETER SINGER & JIM MASON, THE ETHICS OF WHAT WE EAT: WHY OUR FOOD CHOICES MATTER 106 (2006); *Animal Abuse Alleged at Egg Plant*, LAWRENCE JOURNAL-WORLD (July 13, 2005), [http://www2.ljworld.com/news/2005/jul/13/animal\\_abuse\\_alleged\\_egg\\_plant/](http://www2.ljworld.com/news/2005/jul/13/animal_abuse_alleged_egg_plant/) [<http://perma.cc/6L8C-2KLF>].

<sup>74</sup> DANIEL A. SUMNER ET AL., U. CAL. AGRIC. ISSUES CTR., ECONOMIC EFFECTS OF PROPOSED RESTRICTIONS ON EGG-LAYING HEN HOUSING IN CALIFORNIA, at ii–iii (2008), <http://aic.ucdavis.edu/publications/eggs/egginitiative.pdf> [<http://perma.cc/Y9WD-JRSQ>].

<sup>75</sup> *See generally id.*

<sup>76</sup> *See id.* at 87 (displaying Table III.6).

<sup>77</sup> *Id.*

<sup>78</sup> *See id.*

<sup>79</sup> *Id.*

<sup>80</sup> *See id.*

There are also experts who believe that the price of eggs will not increase as dramatically as those cited above.<sup>81</sup> Agralytica, an agriculture and food consultancy, estimated in 2012 that the impact of a nationwide phase-in of “enriched cages” —cages with more humane space allotments—would increase real egg prices by only six cents per dozen in real terms by the time of full implementation, which would not occur until 2030.<sup>82</sup>

Although only time will tell what the long-term economic effect of California’s Proposition 2 and the 2010 Amendment will be, egg prices have been volatile in California following the January 1, 2015 implementation of the larger cage standard.<sup>83</sup> Egg prices in California and the spread between the prices of eggs in California and the Midwest initially rose sharply in January 2015.<sup>84</sup> The price premium between California and the Midwest spiked at \$1.66 per dozen, relative to a typical twelve to eighteen cents per dozen range in prior years.<sup>85</sup> By February, however, prices and spreads had fallen.<sup>86</sup> Industry sources have predicted that the premium between California compliant eggs and the Midwest quote may settle at about forty cents per dozen.<sup>87</sup> In March 2015, the *Wall Street Journal* reported that wholesale egg prices had initially risen to approximately \$3.40 a dozen in California following the January implementation of Proposition 2, but had since fallen to \$2.00 a dozen.<sup>88</sup>

## II. EXISTING AND PROPOSED U.S. FEDERAL LAWS

### A. Background

Three major areas of federal law regarding animals currently do a terrible job protecting farm animals generally, and no job at all protecting laying hens.<sup>89</sup> The Animal Welfare Act covers only animals that are used for research,

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<sup>81</sup> See AGRALYTICA CONSULTING, ECONOMIC IMPACTS OF CONVERTING US EGG PRODUCTION TO ENRICHED CAGE SYSTEMS 1 (2013), [http://www.unitedegg.org/information/pdf/Promar\\_Study\\_2014.pdf](http://www.unitedegg.org/information/pdf/Promar_Study_2014.pdf) [<http://perma.cc/5CGH-J2RF>].

<sup>82</sup> *Id.* (demonstrating how an increase in egg prices of six cents per dozen would be relative to existing prices, taking into account investments that would be expected based on unchanged laws and regulations).

<sup>83</sup> Terrence O’Keefe, *Initial Short Supply Causes Price Run-up for California Eggs*, EGG INDUS., Mar. 2015, at 6, 6, <http://www.eggindustry-digital.com/201503/Default/0/0#&pageSet=4>.

<sup>84</sup> *Id.* at 1–2.

<sup>85</sup> *Id.* (“The spot market price for California-compliant eggs in the month of January averaged \$2.9571 per dozen versus the Midwest average price for eggs of \$1.2946 per dozen, an amazing spread of \$1.66.”).

<sup>86</sup> *Id.* at 2.

<sup>87</sup> *Id.*

<sup>88</sup> Kesmodel, *supra* note 23.

<sup>89</sup> See Rodriguez, *supra* note 1, at 56. See generally Lucinda Valero & Will Rhee, *When Fox and Hound Legislate the Hen House: A Nixon-in-China Moment for National Egg-Laying Standards?*, 65 ME. L. REV. 651 (2013) (providing background on the collaborative efforts of animal rights activists and the egg lobby). Beef cattle live outside and get to stand up, but are often surrounded by their own

shows, or as pets, the Humane Slaughter Act covers cattle, calves, horses, mules, sheep, swine, and other livestock, and the Egg Products Inspection Act regulates, to a degree, egg quality.<sup>90</sup>

Under the Animal Welfare Act, businesses and others that use the animals covered by the law (which does not include laying hens) for research or exhibition purposes, or who hold them for sale as pets, must be licensed or registered, and they must adhere to minimum standards of care.<sup>91</sup> Laying hens are likewise not covered by the Humane Slaughter Act, which calls for the humane slaughter of, but does not require the humane treatment of, cattle, calves, horses, mules, sheep, swine, and “other livestock.”<sup>92</sup> “Other livestock” has been interpreted to include goats and “other equines,” but not poultry.<sup>93</sup> Thus, the only federal law covering laying hens, albeit tangentially, is the Egg Products Inspection Act, which focuses on the quality of the eggs produced and has nothing at all to do with the humane treatment of laying hens.<sup>94</sup>

In the past few years, however, several pieces of federal legislation have been proposed relating to the welfare of laying hens. Examples include the Prevention of Farm Animal Cruelty Act introduced in 2010, the Egg Products Inspection Act Amendments of 2012 and 2013, and the so-called King Amendment, which appears to have been an attempted federal end-run around any more rigorous state-based health and safety laws like California’s Proposi-

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feces. *See generally* Andrew Freeman & Cristina Kharbertyan, 18 ‘Food, Inc.’ Facts Everyone Should Know, TAKEPART (Oct. 24, 2012), <http://www.takepart.com/photos/food-inc-facts/impact-food-inc-lives> [http://perma.cc/2TYZ-N673] (listing disturbing facts about agricultural production). Also, beef cattle are fed corn feed, which does not agree with their digestive systems, and allows E. coli strains to prosper in their waste and to ultimately contaminate their meat. *Id.* It might be argued that these conditions, though deplorable, are still better than those of laying hens. *See id.*

<sup>90</sup> Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1907 (2012); Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2012); Egg Products Inspection Act, 21 U.S.C. §§ 1031–1056 (2012). Even the “Twenty Eight Hour Law” does not apply to laying hens. 49 U.S.C. § 80502 (2012). This federal provision requires handlers to unload animals transported over state lines for more than twenty-eight hours for a five-hour rest to allow for feeding and water. *Id.* Originally passed in the nineteenth century, it contains so many loopholes that it provides very little protection even for other farmed animals. *See id.* For example, animals may be confined for longer than twenty-eight hours when traveling if such confinement is due to an “accident” or if the owner or handler requests in writing that the period without rest, food, or water be extended to thirty-six hours. *Id.*

<sup>91</sup> *See* Animal Welfare Act, 7 U.S.C. §§ 2131–2159. The congressional statement of policy related to the Animal Welfare Act indicates: “The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.” *Id.* § 2131.

<sup>92</sup> *Id.* §§ 1901–1907.

<sup>93</sup> *See* 9 C.F.R. §§ 313.15(5), (9), 313.16 (2015); *see also* Levine v. Conner, 540 F. Supp. 2d 1113, 1113 (N.D. Cal. 2008), *vacated sub nom.* Levine v. Vilsack, 587 F.3d 986 (9th Cir. 2009) (holding that “livestock” within the meaning of the Humane Slaughter Act did not include poultry).

<sup>94</sup> *See* 21 U.S.C. §§ 1031–1056.

tion 2.<sup>95</sup> The King Amendment would have prohibited states from imposing standards on agricultural products produced in other states, but the final Agricultural Act of 2014 did not include it.<sup>96</sup>

In March 2010, two United States representatives from Southern California introduced the Federal Prevention of Farm Animal Cruelty Act.<sup>97</sup> This federal law paralleled California's Proposition 2 and would have provided that covered animals be given adequate space to stand up, lie down and turn around freely, and fully extend all limbs.<sup>98</sup> Animals covered under the law included any pig during pregnancy, calves raised for veal, and egg-laying hens.<sup>99</sup> Notably, the law would have permitted federal agencies to buy only meat from farms that had treated its animals humanely.<sup>100</sup> Because "[t]he federal government spends more than \$1 billion annually purchasing animal products for a variety of programs and agencies, including the National School Lunch Program, the Armed Services and the Bureau of Prisons," this type of legislation could have had a major impact on the national treatment of farm animals.<sup>101</sup> Although referred to the House Committee on Oversight and Government Reform and the House Committee on Agriculture, the proposed legislation was not enacted.<sup>102</sup>

### *B. Bipartisan Legislative Efforts Toward a More Humane Farming System*

There have been other, more cooperative developments toward a more humane farming system, at least as to laying hens. In June 2011 the Humane Society of the United States (the "HSUS") and the United Egg Producers (the "UEP") announced an agreement (the "UEP-HSUS agreement") to work together toward the enactment of new federal legislation covering all hens involved in U.S. egg production.<sup>103</sup> The two groups agreed upon treatment

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<sup>95</sup> H.R. 2642, 113th Cong. (2013) (King Amendment to the Farm Bill); H.R. 1731, 113th Cong. (2013) (2013 Egg Products Inspection Act Amendment); H.R. 3798, 112th Cong. (2012) (2012 Egg Products Inspection Act Amendment); H.R. 4733, 111th Cong. (2010) (Prevention of Farm Cruelty Act).

<sup>96</sup> H.R. 2642; see Cathy Kangas, *The Dangers of King's Farm Bill Amendment*, HUFFINGTON POST: THE BLOG (Mar. 26, 2014, 1:03 PM), [http://www.huffingtonpost.com/cathy-kangas/king-farm-bill\\_b\\_4651649.html](http://www.huffingtonpost.com/cathy-kangas/king-farm-bill_b_4651649.html) [<http://perma.cc/K6D3-L6XK>].

<sup>97</sup> Stewart Doan, *Bipartisan 'Prevention of Farm Animal Cruelty Act' Introduced*, AGRI-PULSE, <http://www.agri-pulse.com/uploaded/20100304D1.pdf> [<http://perma.cc/AT7W-9WW8>].

<sup>98</sup> H.R. 4733.

<sup>99</sup> *Id.*

<sup>100</sup> Doan, *supra* note 97.

<sup>101</sup> See *id.*

<sup>102</sup> See H.R. 4733 (laying out the bill that Congress ultimately rejected).

<sup>103</sup> See Press Release, Humane Soc'y of the U.S., United Egg Producers, Historic Agreement Hatched to Set National Standard for Nation's Egg Industry (July 7, 2011) [hereinafter Historic Agreement], [http://www.unitedegg.org/homeNews/UEP\\_Press\\_Release\\_7-7-11.pdf](http://www.unitedegg.org/homeNews/UEP_Press_Release_7-7-11.pdf) [<http://perma.cc/CC8K-T9KN>].

standards for laying hens and jointly asked Congress to enact federal legislation reflecting these standards.<sup>104</sup> On April 25, 2013, the Egg Products Inspection Act Amendments of 2013 (the “Amendments”) were thus introduced in the 113th Congress.<sup>105</sup> The Amendments would have codified more humane national standards for the housing of laying hens over a phase-in period and established more informative labeling requirements to disclose how eggs are produced.<sup>106</sup> Also, the Amendments would have set air quality standards for hen housing, prohibited forced molting, and established laying hen euthanasia standards.<sup>107</sup>

The UEP-HSUS agreement, embodied in a 2011 joint memorandum of agreement (the “memorandum of understanding”) and subsequent bills, was the result of dialogue and compromise between the UEP and the HSUS, and represented a significant shift of direction for both parties.<sup>108</sup> The UEP apparently believed that passing federal legislation could halt costly state-by-state battles over caged eggs standards that would result in a patchwork of different regulations.<sup>109</sup> Although the HSUS had long campaigned for cage-free egg production in the United States, it believed that endorsing the use of enriched cages was a politically wise compromise that could result in significant federal farm animal welfare legislation.<sup>110</sup>

Importantly, the latest iterations of these bills introduced in the 113th Congress also added provisions specific to California, relating to California’s phase-in periods for new caging.<sup>111</sup> These provisions added a four-step phase-in period for California producers, depending on whether cages are new or existing, and required that all eggs bought or sold in California meet the California-specific rules.<sup>112</sup>

Despite the UEP’s support, some farm groups criticized the proposed legislation.<sup>113</sup> The new standards for laying hens would have been the first federal

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<sup>104</sup> *Id.*

<sup>105</sup> H.R. 1731, 113th Cong. (2013); S. 820, 113th Cong. (2013). These latest bills are nearly identical to earlier bills introduced during the 112th Congress, namely S. 3239 and H.R. 3798. *Compare* H.R. 1731, *and* S. 820, *with* S. 3239, 112th Cong. (2012), *and* H.R. 3798, 112th Cong. (2012).

<sup>106</sup> H.R. 1731; S. 820.

<sup>107</sup> H.R. 1731. *See generally*, Carolyn Greenshields & Kimberly White LaDuca, 2012 *Federal Legislative Review*, 19 ANIMAL L. 457, 476 (2013) (describing the legislative efforts of the second session of the 112th United States Congress).

<sup>108</sup> Historic Agreement, *supra* note 103.

<sup>109</sup> *See id.*

<sup>110</sup> *See* JOEL L. GREENE & TADLOCK COWAN, CONG. RESEARCH SERV., TABLE EGG PRODUCTION AND HEN WELFARE: AGREEMENT AND LEGISLATIVE PROPOSALS 1 (2014), <https://www.fas.org/sgp/crs/misc/R42534.pdf> [<https://perma.cc/9MM8-XS64>].

<sup>111</sup> *See id.* at 9–10.

<sup>112</sup> *Id.*

<sup>113</sup> Jacqui Fatka, *Livestock Industry Divided on Need for Egg Bill*, FARM FUTURES (Aug. 27, 2012), <http://farmfutures.com/blogs-livestock-industry-divided-need-egg-bill-3554> [<http://perma.cc/V7HQ-UZRG>].

standards mandating production practices for farm animals, and opponents were concerned that the proposed legislation could set a precedent for other animals used in farm production.<sup>114</sup> Opponents also argued that the new cage requirements were not science-based, and that codifying cage standards today ignores innovations that could occur in the future.<sup>115</sup> Finally, some opponents warned of the capital cost that would be required to implement the new standards.<sup>116</sup>

Ultimately, although the UEP, HSUS, and other supporters favored moving egg legislation through the farm bill process, other livestock groups strongly and vocally opposed this route.<sup>117</sup> Thus, although the Senate version of the Egg Products Inspection Act Amendments of 2013, S. 820, was considered for inclusion in the Senate Agricultural Committee 2013 farm bill draft, it was not ultimately included.<sup>118</sup> In early 2014, the UEP and HSUS finally decided to end their memorandum of understanding.<sup>119</sup> This followed the passage of the farm bill, the Agricultural Act of 2014, which did not include the laying hen legislative provisions that both groups had desired.<sup>120</sup>

### III. DETAIL OF CALIFORNIA LAW AND RELATED DEVELOPMENTS IN STATE ANIMAL CONFINEMENT LAWS

California's Proposition 2, known as the Prevention of Farm Animal Cruelty Act ("Proposition 2" or the "Act"), applies to all "covered animals."<sup>121</sup> Proposition 2 defines "covered animals" as any pig during pregnancy, calf raised for veal, or egg-laying hen kept on a farm.<sup>122</sup> It specifically prevents any person from tethering or confining any "covered animal" for all or the majority of any day in a manner that prevents such animal from lying down, standing up, fully extending his or her limbs, or turning around freely.<sup>123</sup>

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<sup>114</sup> See *id.* ("Many agricultural groups are opposed to the egg bill, fearing it creates a 'slippery slope' of inserting the federal government into how livestock should be raised.")

<sup>115</sup> *Egg Legislation Replaces Science with Politics*, VOICE OF AGRIC. (Jan. 24, 2012), <http://www.fb.org/newsroom/news/2012/nr0124> [<http://perma.cc/E4A3-ZYM8>].

<sup>116</sup> See GREENE & COWAN, *supra* note 110, at 18.

<sup>117</sup> *Id.* at 1–2.

<sup>118</sup> *Id.* at 7–9. Senator Feinstein's submitted egg bill amendment was likewise not considered during the Senate farm bill, S. 954, floor debate. Agriculture Reform, Food, and Jobs Act of 2013, S. 954, 113th Cong. (2013); 159 CONG. REC. S3695–97 (daily ed. May 21, 2013); GREENE & COWAN, *supra* note 110, at 2.

<sup>119</sup> See Dudley W. Hoskins, *United Egg Producers Decline to Renew MOU with HSUS*, NAT'L ASS'N OF STATE DEP'TS OF AGRIC. (Feb. 19, 2014), <http://www.nasda.org/News/24781.aspx> [<http://perma.cc/9LUD-UENE>].

<sup>120</sup> See Fatka, *supra* note 113.

<sup>121</sup> CAL. HEALTH & SAFETY CODE §§ 25990–25994 (West 2015).

<sup>122</sup> *Id.* § 25991.

<sup>123</sup> *Id.* § 25990.

The amendment to Proposition 2 (the “2010 Amendment”) and the regulations pursuant to the 2010 Amendment created major controversy by extending the reaches of Proposition 2 to any egg producer who sells or contracts to sell a shelled egg for human consumption in California.<sup>124</sup> The 2010 Amendment also provides that a hen laying enclosure containing nine or more egg-laying hens must provide at least 116 square inches of floor space per animal.<sup>125</sup> Further, the regulations promulgated pursuant to Proposition 2 and the 2010 Amendment provide that the enclosure must allow access to drinking water and feed without restriction.<sup>126</sup> As they go into effect, the Act, the 2010 Amendment, and regulations thereunder will potentially change the tide of animal treatment in the United States. At the very least, the new California regulations will end the worst practices associated with battery hen caging.<sup>127</sup>

Following California’s lead, in September 2009, Michigan became the second state to restrict the use of conventional battery cages for laying hens.<sup>128</sup> The Michigan law applies to gestating sows, calves raised for veal, and egg-laying hens on farms.<sup>129</sup> It prohibits Michigan farmers from tethering or confining these “covered” animals in a manner that prevents them from lying down, standing up, fully extending its limbs, or turning around freely.<sup>130</sup> The Michigan law further states that “[i]n the case of egg-laying hens, fully extending its limbs means fully spreading both wings without touching the side of an enclosure or other egg-laying hens and having access to at least 1.0 square feet of usable floor space per hen.”<sup>131</sup> The California law, by contrast, does not specify a minimum amount of space per hen, but rather provides for 116 square inches per hen when the cage houses more than nine laying hens.<sup>132</sup> The Michigan law is scheduled to take effect ten years following its enactment, on October 12, 2019.<sup>133</sup>

During 2011, Washington and Oregon passed similar legislation related to laying hens.<sup>134</sup> Washington’s law provides that licensed entities providing eggs or egg products for intrastate commerce must comply with the United Egg Producers’ (“UEP”) animal husbandry guidelines (“UEP Guidelines”), and by

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<sup>124</sup> See *id.* §§ 25990–25994.

<sup>125</sup> CAL. CODE REGS. tit. 3, § 1350 (2015) (providing a formula for minimum floor space for enclosures containing fewer than nine birds).

<sup>126</sup> *Id.*

<sup>127</sup> See *supra* notes 121–126 and accompanying text.

<sup>128</sup> See GREENE & COWAN, *supra* note 110, at 9.

<sup>129</sup> MICH. COMP. LAWS § 287.746 (2015).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> CAL. CODE REGS. tit. 3, § 1350 (2015).

<sup>133</sup> MICH. COMP. LAWS § 287.746 (“The provisions of this section do not apply to egg-laying hens and gestating sows until 10 years after the enactment date of the amendatory act that added this section.”).

<sup>134</sup> OR. REV. STAT. §§ 632.835–.850 (2013); WASH. REV. CODE § 69.25 (2015).



2026, must comply with American Humane Association protocols for enriched colony housing.<sup>135</sup>

Oregon's law similarly requires laying hen cages to meet UEP Guidelines, with a progressive implementation of enriched colony facility standards through 2026.<sup>136</sup> Many animal rights groups in Oregon felt that these laws did not go far enough, especially with regard to the long time period to phase in the new caging standards.<sup>137</sup> Others felt that because UEP Guidelines are not particularly humane, mandating enriched cages as an endpoint in and of itself didn't go far enough, and legislation should be enacted to support cage-free laying hen standards.<sup>138</sup>

Legislation that protects laying hens often includes protections for other animals, as well. For example, many of these state laws, while related to the humane housing of laying hens, also cover the living conditions of pregnant sows and veal calves.<sup>139</sup> Florida first amended its constitution in 2002 to prohibit the inhumane caging of pigs during pregnancy.<sup>140</sup> Voters in Arizona similarly passed a proposition limiting confinement for both pregnant sows and

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<sup>135</sup> *Confinement Rearing—State Ballot Initiatives, Legislation and Court Activity*, AM. VETERINARY MED. ASS'N (July 2013) [hereinafter *Confinement Rearing*], <https://www.avma.org/Advocacy/StateAndLocal/Pages/sr-confinement-rearing.aspx> [<https://perma.cc/C8HP-TYCJ>]. The Washington law, for example, requires eggs and egg products to be produced by housing facilities approved under the American Humane Association facility system plan for enriched colony housing. *Id.* Full compliance with these standards is required by January 1, 2026. *Id.* All new facilities built after January 1, 2012, must also be constructed in accordance with these standards. *Id.* In addition, there is an intermediate standard for eggs produced after January 1, 2017. WASH. REV. CODE § 69.25.065. These intermediate standards require 116.3 square inches per hen and access to areas for nesting, scratching, and perching. *See id.* §§ 69.25.065, 69.25.107. Birds are not free roaming, but have access to nesting and perching areas. *See* Press Release, Am. Humane Ass'n, American Humane Approves Enriched Colony Hen Housing as Humane Alternative to Conventional Cages (June 18, 2010), <http://www.americanhumane.org/animals/animal-welfare-news/american-humane-approves-enriched-colony-hen-housing-as-humane-alternative-to-conventional-cages.html> [<http://perma.cc/5648-MZJB>] (noting that enriched colony housing provides hens with larger cages that allow for some natural behaviors). Colony housed laying hens do not have access to the outdoors. *See id.*

<sup>136</sup> Editorial, *Over Easy or Scrambled?*, OREGONLIVE (May 26, 2011), [http://blog.oregonlive.com/opinion\\_impact/print.html?entry=/2011/05/over\\_easy\\_or\\_scrambled.html](http://blog.oregonlive.com/opinion_impact/print.html?entry=/2011/05/over_easy_or_scrambled.html) [<https://perma.cc/YTG5-YCEN>].

<sup>137</sup> *See id.*

<sup>138</sup> *See* Jayme Fraser, *Animal Rights Groups Disagree, Scramble to Define 'Humane' in Egg Debate*, OREGONLIVE (July 6, 2011), [http://www.oregonlive.com/politics/index.ssf/2011/07/animal\\_rights\\_groups\\_disagree.html](http://www.oregonlive.com/politics/index.ssf/2011/07/animal_rights_groups_disagree.html) [<http://perma.cc/DZN8-6ADD>] ("Oregonians for Humane Farms, which is collecting signatures for a cage-free ballot initiative, says the moral cost of America's cheap eggs is too high."); *supra* notes 34–73 and accompanying text.

<sup>139</sup> *See* Jill Colvin, *Christie Vetoes Pig Crate Bill in Controversial Move*, HUFFINGTON POST (Jan. 28, 2015), [http://www.huffingtonpost.com/2014/11/28/christie-vetoes-pig-bill\\_n\\_6238926.html](http://www.huffingtonpost.com/2014/11/28/christie-vetoes-pig-bill_n_6238926.html) [<http://perma.cc/KPE3-S6NM>] (stating that Governor Chris Christie vetoed a New Jersey law banning crates for pregnant sows, and that even though the law would have had little to no effect in New Jersey, it would have had a big impact in Iowa, home to one of the presidential caucuses, and where it may not have been favored by Iowa voters).

<sup>140</sup> FLA. CONST. art. X, § 21.

calves raised for veal in 2006.<sup>141</sup> Oregon, Colorado, Maine, and Rhode Island likewise passed legislation limiting animal confinement for animals other than hens between 2007 and 2012.<sup>142</sup> Oregon's anti-confinement law applies to gestating sows, whereas Colorado, Maine, and Rhode Island's state laws apply to pregnant sows and calves raised for veal.<sup>143</sup>

Finally, Ohio and Kentucky have both recently reached non-legislative compromises between animal rights groups and farmers on the issue of animal confinement. Both states have legislatively-appointed "Livestock Care Standards Boards" that establish and maintain standards governing the care and well-being of on-farm livestock.<sup>144</sup> In 2010, Ohio farmers agreed with the Humane Society of the United States ("HSUS") to phase out veal calf crates by 2017 and remove gestation stalls for sows by 2025.<sup>145</sup> In 2013, Kentucky approved new standards for the care and treatment of farm animals, which included the phasing out of veal calf crates by 2017.<sup>146</sup> These Kentucky standards did not address battery cages for laying hens or gestation crates for sows.<sup>147</sup>

#### IV. EUROPEAN UNION LAW

In contrast to the patchwork of somewhat limited United States laws regarding animal confinement described above, European law is more protective of animals in confinement.<sup>148</sup> Article 13 of the Treaty on the Functioning of the European Union classifies animals as "sentient beings," requiring that "full regard be given to the welfare requirements of animals while formulating and enforcing" European Union (EU) policies.<sup>149</sup> There also exists a European Commission Council Directive (the "Council Directive") related to the welfare

<sup>141</sup> ARIZ. REV. STAT. ANN. § 13.2910.07 (2015); ARIZ. REV. STAT. ANN. § 13.2910.08 (2006).

<sup>142</sup> COLO. REV. STAT. §§ 35-50.5-101 to -103 (2015); ME. STAT. tit. 7, § 4020, tit. 17, § 1039 (2015); OR. REV. STAT. § 600.150 (2013); 4 R.I. GEN LAWS §§ 4-1-1 to -6 (2015).

<sup>143</sup> Compare OR. REV. STAT. § 600.150, with COLO. REV. STAT. §§ 35-50.5-101 to -103, ME. STAT. tit. 7, § 4020, tit. 17, § 1039, and 4 R.I. GEN LAWS §§ 4-1-1 to -6.

<sup>144</sup> OHIO REV. CODE ANN. § 904.01-.09 (West 2015); KY. REV. STAT. ANN. § 257.192 (West 2015). See generally Lindsay Vick, Comment, *Confined to a Process: The Preemptive Strike of Livestock Care Standards Boards in Farm Animal Welfare Regulation*, 18 ANIMAL L. 151 (2011) (describing the state of Ohio's factory farm animal welfare laws).

<sup>145</sup> ELIZABETH R. RUMLEY, NAT'L AGRIC. LAW CTR., LEGAL ISSUES IN ANIMAL AGRICULTURE: REGULATING LIVING SPACE 12 (2011), <http://foodanimalwellbeing.uark.edu/SympPDFs/Confinement%20PPT%20-%20E%20Rumley.pdf> [<http://perma.cc/LF6U-ETPC>].

<sup>146</sup> Janet Patton, *Agricultural Board Approves Livestock Care Standards Despite Objections*, LEXINGTON HERALD-LEADER (Mar. 27, 2013) [<http://perma.cc/2UPN-HV8K>] (original hyperlink no longer active).

<sup>147</sup> *Id.*

<sup>148</sup> See Braunschweig-Norris, *supra* note 43, at 512-13.

<sup>149</sup> *European Commission Communication to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, at 2, COM (2012) 6 final (Jan. 19, 2012).

of farm animals generally.<sup>150</sup> The Council Directive lays down minimum standards for the protection of farm animals among member states of the EU.<sup>151</sup> These include general provisions related to staffing, inspection, record keeping, animals' freedom of movement, animal accommodations, equipment, feed and water, mutilations, and breeding.<sup>152</sup> Additional legislation protects farm animals during transport and at the time of slaughter.<sup>153</sup> Other Council Directives specifically protect farm animals during their lives, and include provisions regarding calves, pigs, broilers, and laying hens.<sup>154</sup>

On June 17, 1999, the EU announced the passage of Council Directive 1999/74/EC (the "1999 EU Directive"), laying down minimum standards for the protection of laying hens in establishments that house 350 or more birds.<sup>155</sup> For establishments to which the standards apply, the 1999 EU Directive phased out the use of battery cages for laying hens over a thirteen-year period.<sup>156</sup> The phase-out period was meant to allow egg farmers time to come into compliance.<sup>157</sup>

Egg production in the EU thus now allows only non-battery cage systems, such as free-roaming or barn systems or enriched caging systems.<sup>158</sup> Similar to enriched caging requirements under Washington and Oregon state law, enriched cages in the EU (also known as colony cages) have a small perch, a litter area for scratching, and a nesting box.<sup>159</sup> These cages are slightly taller than a conventional battery cage and have more space per hen.<sup>160</sup> In particular, the enriched cages suitable for use in the EU have at least 750 square centimeters of cage area per hen, with a cage height of at least twenty centimeters at every point.<sup>161</sup> The 1999 EU Directive also specifies that in addition to a litter, nest,

<sup>150</sup> Council Directive 98/58, 1998 O.J. (L 221) 23–27 (EC).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Council Regulation 1/05, 2004 O.J. (L 3) 1 (EU) (establishing standards for the protection of animals during transport); Council Directive 93/119, 1993 O.J. (L 340) 21 (EC) (establishing standards for the protection of animals at the time of slaughter or killing).

<sup>154</sup> Council Directive 08/120, 2008 O.J. (L 47) 5 (EC) (concerning calves); Council Directive 07/43, 2007 O.J. (L 182) 19 (EC) (concerning pigs); Council Directive 99/74, 1999 O.J. (L 203) 53 (EC) (concerning broilers and laying hens).

<sup>155</sup> Council Directive 99/74, 1999 O.J. (L 203) 53 (EC); GREENE & COWAN, *supra* note 110, at 25.

<sup>156</sup> GREENE & COWAN, *supra* note 110, at 24–25.

<sup>157</sup> James Andrews, *European Union Bans Battery Cages for Egg-Laying Hens*, FOOD SAFETY NEWS (Jan. 19, 2012), [www.foodsafetynews.com/2012/01/european-union-bans-battery-cages-for-egg-laying-hens/](http://www.foodsafetynews.com/2012/01/european-union-bans-battery-cages-for-egg-laying-hens/) [http://perma.cc/Z6C2-MKB9].

<sup>158</sup> GREENE & COWAN, *supra* note 110, at 24–25.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Council Directive, 99/74, art. 1, 1999 O.J. (L 203) 53 (EC).

and appropriate perches, each hen must have a feed trough with a length of twelve centimeters per hen in the cage.<sup>162</sup>

Evidencing what appears to be a concern for the humane treatment of animals, several countries within the EU banned the use of battery cages ahead of the 2012 deadline, including Sweden by the end of 2002, Austria by the end of 2008, and Germany by the end of 2009.<sup>163</sup> As of January 1, 2012, the ban on battery cages was officially and fully implemented in the EU, with all but Italy, Greece, and Cyprus reporting to be in compliance as of November 2012.<sup>164</sup> Although not a member of the EU, Switzerland also banned battery cages in 1992.<sup>165</sup>

Though EU policies are generally quite protective of laying hens, currently there is no ban on the import of battery cage produced eggs into the EU from non-EU countries,<sup>166</sup> potentially allowing distributors to do an end-run around existing European regulation meant to protect animal welfare. Under the EU marketing rules for eggs in place since 2007, however, imported eggs do require a country-of-origin label and must indicate if the farming method used to produce the eggs was “non-[European Commission] standard.”<sup>167</sup>

#### V. ORGANIC EGG PRODUCTION IN THE UNITED STATES UNDER THE ORGANIC FOODS PRODUCTION ACT

The United States lags far behind Europe in terms of any coherent implementation of more humane laying hen farming laws.<sup>168</sup> The United States Department of Agriculture (“USDA”) standard for “organic,” however, might be one type of federally regulated food production considered more humane than typical battery cage production.<sup>169</sup> The Organic Foods Production Act of 1990 (the “OFPA”) and corresponding regulations control organic food production in the United States.<sup>170</sup> Under the OFPA, “organic food” is produced “by farmers who emphasize the use of renewable resources and the conservation of soil and water to enhance environmental quality for future genera-

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<sup>162</sup> *Id.*

<sup>163</sup> GREENE & COWAN, *supra* note 110, at 26; *see also* Andrews, *supra* note 157.

<sup>164</sup> GREENE & COWAN, *supra* note 110, at 24–25; Andrews, *supra* note 157.

<sup>165</sup> GREENE & COWAN, *supra* note 110, at 25.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Compare *supra* notes 89–120 and accompanying text, with *supra* notes 148–167 and accompanying text.

<sup>169</sup> See *infra* notes 170–190 and accompanying text.

<sup>170</sup> 7 C.F.R. § 205 (2015); *see* 7 U.S.C. §§ 6501–6522 (2012); Valerie J. Watnick, *The Organic Foods Production Act, the Process/Product Distinction, and a Case for More End Product Regulation in the Organic Foods Market*, 32 UCLA J. ENVTL. L. & POL’Y 40, 40–79 (2014) (providing a detailed discussion of the Organic Foods Production Act and corresponding regulations).

tions.”<sup>171</sup> Farmers engaged in raising “organic” animals, including laying hens producing eggs, must use one hundred percent organic feed, and must not give hormones or antibiotics to their animals, except in cases of illness.<sup>172</sup> Generally, the OFPA and corresponding regulations also require organic livestock producers to provide conditions that “allow for exercise, freedom of movement, and reduction of stress appropriate to the species.”<sup>173</sup> Producers must establish minimum livestock living conditions that accommodate the “health and natural behavior” of the animals, including access to the outdoors.<sup>174</sup>

In the case of laying hens, however, the use of beak trimming is permitted in organic farming, despite the abusive and painful results for hens.<sup>175</sup> Though these provisions place a greater emphasis on the welfare and treatment of animals than battery cage practices, organic regulations are loosely worded and often open to interpretation, which may not always ensure humane animal husbandry.<sup>176</sup> For example, federal organic regulations require that animals be given access to the outdoors, but they also allow confinement due to “inclement weather” or “the animal’s stage of life.”<sup>177</sup> Various interpretations of these loosely worded organic regulations thus allow practices that may not always be in the best interests of the animals.<sup>178</sup>

For example, in the well-known case *Massachusetts Independent Certification, Inc. v. Johanns* (“Country Hen”), the United States District Court for the District of Massachusetts considered the living conditions of so called “or-

<sup>171</sup> 7 C.F.R. § 205. The OFPA called for the Secretary of the USDA to administer the National Organic Program (“NOP”) and to form the National Organic Standards Board. See 7 U.S.C. §§ 6503, 6518. Under the NOP, the Agricultural Marketing Service oversees national standards for the production and handling of organically produced agricultural products. See *National Organic Program*, AGRIC. MKTG. SERV., U.S. DEP’T AGRIC., <http://www.ams.usda.gov/about-ams/programs-offices/national-organic-program> [<http://perma.cc/67ML-HQQ4>]. Those producing organic food are required to submit an organic plan that must be approved by a third party certifying agent and if one exists, by the state’s organic program. 7 U.S.C. § 6513.

<sup>172</sup> 7 U.S.C. § 6509. Livestock that is to be labeled and sold as “USDA Organic” must also be under organic management from the last third of gestation, with the exception of poultry, which must be under organic management from the first days of life. *Id.*; BARBARA ROBINSON, U.S. DEP’T OF AGRIC., VALUE THROUGH VERIFICATION: USDA NATIONAL ORGANIC PROGRAM (n.d.), <http://www.organiccotton.org/oc/wGlobal/scripts/wDownloadDocument.php?path=/oc/Cotton-general/Cotton-initiatives/pdf/getfile.pdf&count=1>; *Choose Organic to Avoid Foods Produced with Antibiotics*, ORGANIC IT’S WORTH IT, <http://www.organicitsworthit.org/learn/choose-organic-avoid-foods-produced-antibiotics> [<http://perma.cc/B6HZ-HU4U>].

<sup>173</sup> 7 C.F.R. § 205.238(a)(4).

<sup>174</sup> *Id.* § 205.239(a)(1).

<sup>175</sup> See Rodriguez, *supra* note 1, at 52–57, 73; *supra* notes 40–44 and accompanying text.

<sup>176</sup> See Aurora Paulsen, Comment, *Welfare Improvement for Organic Animals: Closing Loopholes in the Regulation of Organic Animal Husbandry*, 17 ANIMAL L. 337, 343–67 (2011).

<sup>177</sup> 7 C.F.R. § 205.239(b)(1)–(2).

<sup>178</sup> See *infra* notes 188–190 and accompanying text. See generally Paulsen, *supra* note 176 (examining the vague requirements of organic food regulations and the ways in which they can be made more specific to ensure that organic animals are able to partake in natural behaviors).

ganic” laying hens.<sup>179</sup> In *Country Hen*, a certifier had denied organic certification for laying hens where the producer, Country Hen, had simply added porches to existing hen houses to provide access to the outdoors, but made little other change to the living environment when converting to an organic operation.<sup>180</sup> Country Hen appealed the denial of organic certification to the Administrator of the Agricultural Marketing Service (the “Administrator”) under the National Organic Program.<sup>181</sup> The Administrator sustained Country Hen’s appeal and allowed an organic certification.<sup>182</sup> The certifier then sued the Administrator, claiming that he, the certifier, had a stake in the outcome of the case, which would affect his business and its future certification of organic animals.<sup>183</sup> The court held that although the certifier did have standing, the Administrator’s decision was not arbitrary, so Country Hen’s certification was affirmed.<sup>184</sup>

In the wake of *Country Hen*, many industrial egg producers followed suit by adding porches and making other minor changes to their hen houses to convert them to “organic” operations.<sup>185</sup> These changes, however, did not provide meaningful access for the affected birds.<sup>186</sup> Indeed, adding a few small porches for hundreds of caged birds would not really allow the birds to actually have space to access the outdoors. *Country Hen* therefore remains an important ruling that has significantly muddied the waters in the multi-million-dollar organic egg industry. Consumers do not know and cannot always ascertain the actual treatment of laying hens or the true quality of the “organic” eggs they are buying.<sup>187</sup>

Although certainly not airtight regarding humane animal standards, federal organic standards make clear that laying hens, and any organic farm animals, must have some access to the outdoors, and that accommodations must be made for the health and “natural behavior” of the animals.<sup>188</sup> At a minimum, the organic production standards potentially eliminate some of the very worst conditions for animals, and in theory at least, impose decent and humane con-

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<sup>179</sup> 486 F. Supp. 2d 105, 109 (D. Mass. 2007).

<sup>180</sup> *Id.* at 112.

<sup>181</sup> *Id.* at 113.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 113–15.

<sup>184</sup> *Id.* at 115, 119–20; see Watnick, *supra* note 170, at 40 (discussing the Country Hen case).

<sup>185</sup> Jill Richardson, *Are Organic Eggs Really Healthier and Tastier and from Happier Chickens Than Conventional Eggs?*, ALTERNET (Oct. 5, 2010), [http://www.alternet.org/story/148408/Are\\_organic\\_eggs\\_really\\_healthier\\_and\\_tastier\\_and\\_from\\_happier\\_chickens\\_than\\_conventional\\_eggs](http://www.alternet.org/story/148408/Are_organic_eggs_really_healthier_and_tastier_and_from_happier_chickens_than_conventional_eggs) [<http://perma.cc/C6R9-MHG2>].

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*; see 7 C.F.R. § 205.239(a)(1) (2015). See generally Paulsen, *supra* note 176 (noting that organic regulations are often loosely worded and open to interpretation).

<sup>188</sup> See *supra* notes 168–187 and accompanying text.

ditions for farm animals, including laying hens.<sup>189</sup> An examination of how these regulations could be strengthened is beyond the scope of this Article, but the fact that they need strengthening to better protect the welfare of animals certainly bears mentioning at this juncture.<sup>190</sup>

## VI. FACTORY FARMS AND OUR MORAL AND ETHICAL OBLIGATION TO ANIMALS

### *A. The Factory Farm and the Costs to Humans: An Instrumental Argument Against the Factory Farm*

The over 300 million factory farmed hens and millions of other farm animals in the United States do not live the bucolic life depicted on egg cartons, butter wrappers, and other packaging.<sup>191</sup>

For instance, factory farmed beef cows stand in their own feces and are fed corn, rather than grass, because corn is abundant and inexpensive.<sup>192</sup> This practice goes on despite evidence that it disrupts certain physiological mechanisms, including their ability to digest their intake.<sup>193</sup> These disruptions can cause the production of harmful bacteria in the cattle's liver and digestive tract, making the animals extremely uncomfortable and increasing the risk of *E. coli* contamination for consumers.<sup>194</sup> Indeed, cows that eat only corn rather than grass prior to slaughter are more likely to spread *E. coli* and other bacterial ills, especially if they stand in closely packed stalls surrounded by other beef cows and their manure.<sup>195</sup> Factory farmed eggs also have a much greater risk of salmonella contamination compared to eggs harvested from traditional farms.<sup>196</sup>

<sup>189</sup> See *supra* notes 168–188 and accompanying text. But cf. Rodriguez, *supra* note 1, at 52–79 (arguing that from a moral and legal standpoint, consumers should avoid eating most eggs).

<sup>190</sup> See generally Watnick, *supra* note 170, at 40; Paulsen, *supra* note 176, at 341–43 (advocating for the strengthening of organic farming regulations and standards).

<sup>191</sup> See *Factory Farms: A Closer Look at Animals on Factory Farms*, *supra* note 54; Cole Mellino, Ryan Gosling: What Costco Doesn't Want You to Know About Their Eggs, ECOWATCH (June 26, 2015, 10:42 AM), <http://ecowatch.com/2015/06/26/ryan-gosling-costco-eggs/> [<http://perma.cc/254M-JCSR>] (describing how the conditions at an egg supplier were “in stark contrast to the happy hens and green fields depicted on egg cartons”).

<sup>192</sup> Interview by Frontline with Michael Pollan, former editor at Harper's Magazine, author of *The Botany of Desire*, <http://www.pbs.org/wgbh/pages/frontline/shows/meat/interviews/pollan.html> [<http://perma.cc/J33E-WPJ9>].

<sup>193</sup> *Id.*

<sup>194</sup> *Diet and Disease in Cattle: High-Grain Feed May Promote Illness and Harmful Bacteria*, SCI. DAILY (May 11, 2001), <http://www.sciencedaily.com/releases/2001/05/010511074623.htm> [<https://perma.cc/A7ZM-GYYD>] (discussing the harmful effects of a grain-based, fiber-deficient diet on cows); see R. Jason Richards & Erica L. Richards, *Cheap Meat: How Factory Farming Is Harming Our Health, the Environment, and the Economy*, 4 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 31, 47–48 (2012); FOOD, INC. (Magnolia Home Entertainment 2009).

<sup>195</sup> FOOD, INC., *supra* note 194.

<sup>196</sup> Lovvorn & Perry, *supra* note 28, at 152–53 (citing *Report of the Task Force on Zoonoses Data Collection on the Analysis of the Baseline Study on the Prevalence of Salmonella in Holdings of*

In addition to the relationship between factory farming and food borne illnesses such as incidences of *E. coli* and other poisonings in the U.S. food supply, the factory farms themselves also negatively affect human health in terms of pollution and antibiotic resistance.<sup>197</sup> Factory farmed hens and other animals living in cramped enclosed quarters are prophylactically given antibiotics to reduce the spread of bacterial infection and promote growth.<sup>198</sup> This use has been linked to the emergence of antibiotic-resistant microbes that can be passed from animals to humans.<sup>199</sup> Factory farm workers thus often develop antibiotic resistance.<sup>200</sup>

Such resistance has led to the development of dangerous “superbugs” in people that defy treatment with existing antibiotics.<sup>201</sup> When testifying before Congress, Professor of Medicine, Microbiology, and Molecular Biology, Stuart Levy, noted the rapid development of antibiotic resistant strains of bacteria in farm animals when they were given “nontherapeutic” (often called sub-therapeutic) antibiotics in their feed.<sup>202</sup> Importantly, the commonly used terminology “sub-therapeutic” belies the real meaning for such antibiotics, as they

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*Laying Hen Flocks of Gallus*, 2007(2) EFSA J. 97 (2007), [http://www.efsa.europa.eu/sites/default/files/scientific\\_output/files/main\\_documents/97r.pdf](http://www.efsa.europa.eu/sites/default/files/scientific_output/files/main_documents/97r.pdf) [<http://perma.cc/2ALQ-W4XY>]; Harriet Namata et al., *Salmonella in Belgian Laying Hens: An Identification of Risk Factors*, 83 PREVENTATIVE VETERINARY MED. 323, 323–24 (2008).

<sup>197</sup> See Emily Kolbe, Note, “Won’t You Be My Neighbor?” Living with Concentrated Animal Feeding Operations, 99 IOWA L. REV. 415, 425–27 (2013) (describing how workers also suffer injury from factory farms, including developing antibiotic resistance and injury from animals or machinery); Freeman & Kharbartyan, *supra* note 89; *Pollution from Giant Livestock Farm Threatens Public Health*, NAT. RES. DEF. COUNCIL, <http://www.nrdc.org/water/pollution/nspills.asp> [<http://perma.cc/G9QS-MW42>].

<sup>198</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-04-490, ANTIBIOTIC RESISTANCE: FEDERAL AGENCIES NEED TO BETTER FOCUS EFFORTS TO ADDRESS RISK TO HUMANS FROM ANTIBIOTIC USE IN ANIMALS 10 (2004) [hereinafter GAO-04-490, ANTIBIOTIC RESISTANCE], <http://www.gao.gov/assets/250/242186.pdf> [<http://perma.cc/25YJ-AP2W>]; see PEW COMM’N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 13 (n.d.), [http://www.ncifap.org/\\_images/pcifapfin.pdf](http://www.ncifap.org/_images/pcifapfin.pdf) [<http://perma.cc/FM88-DA4N>].

<sup>199</sup> GAO-04-490, ANTIBIOTIC RESISTANCE, *supra* note 198, at 1; see PEW COMM’N ON INDUS. FARM ANIMAL PROD., *supra* note 198, at 3.

<sup>200</sup> Kolbe, *supra* note 197, at 426–27.

<sup>201</sup> *Antibiotic Resistance and the Use of Antibiotics in Animal Agriculture: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce*, 111th Cong. 216–23 (2010) [hereinafter Statement of Dr. Stuart B. Levy] (statement of Dr. Stuart B. Levy, President, Alliance for the Prudent Use of Antibiotics); *Factory Farms: Hell for Hens*, STOP FACTORY FARMS, <http://www.stopfactoryfarms.org/factory-farms-hell-for-hens/> [<http://perma.cc/6EZN-8PDZ>].

<sup>202</sup> Statement of Dr. Stuart B. Levy, *supra* note 201; see Press Release, Johns Hopkins Bloomberg Sch. of Pub. Health, New USDA-Certified Standard on Antibiotics Limits Some, but Not All Sub-therapeutic Antibiotic Use in Poultry (May 7, 2015), <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/news-room/News-Releases/2015/New-USDA-Certified-Standard-Antibiotics-Limits-Some-but-Not-All-Sub-therapeutic-Antibiotic-use-Poultry.html> [<http://perma.cc/M9JT-ZMZE>].



are not really “therapeutic” at all.<sup>203</sup> Rather, sub-therapeutic antibiotic use refers to providing feed containing antibiotics as a provisional measure, not to treat an illness.<sup>204</sup> Thus, antibiotics on the factory farm are given to promote growth and ward off disease, *not to treat any existing condition*, in the often tight, dirty conditions in which the animals must live.<sup>205</sup> It is worth noting that the European Union (EU) has phased out the sub-therapeutic agricultural use of antibiotics, and Johns Hopkins University and the Pew Charitable Trusts have likewise recommended that the United States follow suit.<sup>206</sup>

Additionally, factory farms in the United States are dangerous places for farm workers and exact enormous tolls on surrounding communities.<sup>207</sup> Workers often toil under terrible conditions as the air they breathe is laced with hazardous gases and toxins.<sup>208</sup> These workers, who are often immigrants without adequate access to health care, also suffer from injuries caused by excessive noise on the job, the animals themselves, and/or machinery at the plant.<sup>209</sup> These negative health effects are likely to rise, as the ratio of workers to animals is decreasing, and factory farms continue to grow in size.<sup>210</sup>

To compound these negative direct effects on human health, factory farming of eggs also results in significant quantities of air and water pollution to

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<sup>203</sup> See *Therapeutic*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/therapeutic> [<http://perma.cc/26QR-FPNU>] (defining therapeutic as “of or relating to the treatment of disease or disorders by remedial agents or methods . . . 2: providing or assisting in a cure”).

<sup>204</sup> Aude Teillant & Ramanan Laxminarayan, *Economics and Antibiotics Use in U.S. Swine and Poultry Production*, CHOICES, 1st Quarter 2015, at 1, [http://www.choicesmagazine.org/magazine/pdf/cmsarticle\\_404.pdf](http://www.choicesmagazine.org/magazine/pdf/cmsarticle_404.pdf) [<http://perma.cc/8W2D-V6PR>] (identifying sub-therapeutic antibiotics as those used primarily to hasten growth and prevent disease).

<sup>205</sup> Sudeshna Ghosh & Timothy M. LaPara, *The Effects of Subtherapeutic Antibiotic Use in Farm Animals on the Proliferation and Persistence of Antibiotic Resistance Among Soil Bacteria*, 1 INT’L SOC’Y FOR MICROBIAL ECOLOGY J. 191, 191–203 (2007), <http://www.nature.com/ismej/journal/v1/n3/full/ismej200731a.html>; see *Antibiotic Resistance and the Threat to Public Health: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Comm.*, 111th Cong. 26–48 (2010) (statement of Thomas Frieden, Director, Centers for Disease Control and Prevention); David DeGrazia, *Moral Vegetarianism from a Very Broad Basis*, 6 J. MORAL PHIL. 143, 153–55 (2009).

<sup>206</sup> See Amy Pruden, *Antibiotic Resistance Associated with CAFOs*, in HORMONES AND PHARMACEUTICALS GENERATED BY CONCENTRATED ANIMAL FEEDING OPERATIONS: TRANSPORT IN WATER AND SOIL 71, 71–72 (Laurence S. Shore & Amy Pruden eds., 2009) (stating further that the American Medical Association, the American Society for Microbiology, and the American Public Health Association have also all recommended a ban on sub-therapeutic animal antibiotic use); *Mission and Values*, PEW CHARITABLE TRS., <http://www.pewtrusts.org/en/about/mission-and-values> [<http://perma.cc/23XT-8824>] (stating that the Pew Charitable Trusts is an independent nonprofit organization dedicated to informing and engaging citizens, and to laying the framework for solutions to challenging current problems).

<sup>207</sup> See *infra* notes 208–212 and accompanying text.

<sup>208</sup> Kolbe, *supra* note 197, at 426–27.

<sup>209</sup> *Id.* at 426.

<sup>210</sup> *Id.*

surrounding areas.<sup>211</sup> In a lawsuit against Olivera Egg Ranch ( the “Ranch”) in California’s Central Valley, the local community alleged that contrary to the defendants’ claims that cramming hens in cages was good for the birds and the environment, the Ranch was having a devastating effect on the local population, polluting the air and causing upper respiratory sickness in the surrounding community.<sup>212</sup>

In the United States, factory farming of other “covered” animals such as cows, pigs, and veal calves also contributes to massive water and air pollution. Experts have indeed reported that as a result of voluminous discharges of common pollutants from manure into the Gulf of Mexico, portions of the gulf are so lacking in oxygen that they cannot support sea life.<sup>213</sup> Experts have dubbed these areas “dead zones” because they are so polluted that life cannot thrive.<sup>214</sup>

Further harming the environment, the operation of factory farms involves enormous expenditures of fossil fuels.<sup>215</sup> In a traditional farm setting, grazing animals such as cows eat the grass, and cow waste fertilizes the grass, so the farm requires no import of food or export of waste.<sup>216</sup> In stark contrast, factory farms must import animal feed and export animal waste.<sup>217</sup> The importation of food to the farm and exportation of waste expends excess fossil fuels, thereby burning non-renewable energy and contributing to rising carbon dioxide emissions in the world.<sup>218</sup>

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<sup>211</sup> *Id.* at 419–22, 426–27; *Calif. Locals vs. Lake of Chicken Waste*, NBC NEWS (Feb. 19, 2010, 6:43 AM), [http://www.nbcnews.com/id/35474921/ns/us\\_news-environment/t/calif-locals-vs-lake-chicken-waste/#.VWdAlvC-2ew](http://www.nbcnews.com/id/35474921/ns/us_news-environment/t/calif-locals-vs-lake-chicken-waste/#.VWdAlvC-2ew) [<http://perma.cc/7JS2-CYBT>].

<sup>212</sup> Complaint at 1–14, *Avila v. Olivera Egg Ranch, LLC*, No. 2-02488 (E.D. Cal. Oct. 20, 2008); Lovvorn & Perry, *supra* note 28, at 164.

<sup>213</sup> Kolbe, *supra* note 197, at 422.

<sup>214</sup> *Id.*

<sup>215</sup> Ronnie Cummins, *How Factory Farming Contributes to Global Warming*, ECOWATCH (Jan. 21, 2013), <http://ecowatch.com/2013/01/21/factory-farming-global-warming/> [<http://perma.cc/638U-P9KX>]; see FOOD, INC., *supra* note 194.

<sup>216</sup> PATRICK CATEL, *RAISING LIVESTOCK: ETHICS OF FOOD* 6 (Adam Miller et al. eds., 2012).

<sup>217</sup> See FOOD, INC., *supra* note 194.

<sup>218</sup> *Id.*

*B. Our Moral and Ethical Obligation to the Animals: An Ethical Argument to Improve the Treatment of Farm Animals*

1. Shocking Developments in California and a Call to Action

In addition to the environmental and human health concerns discussed above, factory farming in the United States adds stress and misery to the animals that provide our food, and it is morally wrong.<sup>219</sup>

Indeed, California's Proposition 2 ("Proposition 2") was at least in part born of moral outrage over events discovered at the Westland Meat Company, Inc., the second largest supplier of beef to the National School Lunch Program, and those in Chino, California, at the federally inspected Hallmark Meat Packing Company. A U.S. Humane Society employee documented instances of animal abuse at the Hallmark and Westland facilities, capturing video footage of sick animals being prodded with sharp instruments, in some cases in the eye, to force them to walk to slaughter.<sup>220</sup> It also showed animals being tortured with electrical shocks and high pressure water hoses to force them to slaughter.<sup>221</sup>

In the midst of the scandal in Chino, California, the Humane Society of the United States ("HSUS") filed suit under the Federal False Claims Act, claiming that the business had defrauded the public by selling food to the federal government in violation of the terms of its contracts, which specifically required the humane treatment of farm animals.<sup>222</sup> The suit sought \$150 million against Hallmark.<sup>223</sup> District Attorney Michael Ramos intervened, and in prosecuting the workers shown on the video, stated that his office would take "all cases involving animal cruelty very seriously" and that "'unnecessary cruelty' [would] not be tolerated and [would] be prosecuted to the fullest extent allowed by law."<sup>224</sup>

Another well-known case of factory farming animal abuse took place at Norco Ranch in Riverside County, California in 2008.<sup>225</sup> In this incident, Mercy for Animals, a not for profit group concerned about animal mistreatment, documented the despicable conditions at an egg production factory farm in Menifee, Riverside County, California.<sup>226</sup> The documentary showed birds with

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<sup>219</sup> See DeGrazia, *supra* note 205, at 151–53 (describing typical lives of factory farmed hogs, cows, and hens, noting that male pigs are often castrated at ten days of age without anesthesia); *infra* notes 248–261 and accompanying text.

<sup>220</sup> Lovvorn & Perry, *supra* note 28, at 156–57.

<sup>221</sup> See *id.*

<sup>222</sup> *Id.* at 158.

<sup>223</sup> *Id.* at 158–59.

<sup>224</sup> Michael Ramos, *Hallmark Meat Packing Case*, SAN BERNARDINO CTY. DIST. ATTORNEY, <http://www.sbcountyda.org/ProsecutingCriminals/AnimalCrueltyTaskForce/HallmarkMeatPackingCase.aspx> [<http://perma.cc/E3UG-PUFC>].

<sup>225</sup> See Lovvorn & Perry, *supra* note 28, at 161–62.

<sup>226</sup> *Id.*

open bleeding wounds, caged birds unable to reach water or food, and workers breaking the necks of chickens and leaving them writhing in pain, alive, on piles of dead hens.<sup>227</sup> These cases in Chino and at Norco Ranch, taken together, served as a backdrop against which the public voted on California's Proposition 2 in 2008.<sup>228</sup>

The public got behind Proposition 2 even though it was hotly contested by the agriculture industry, which continued to claim that factory farming is good for animals and that only healthy animals "produce."<sup>229</sup> Controverting these claims, Mercy for Animals released the Norco Ranch video showing that Norco Ranch was still a productive enterprise, producing thousands of eggs every day, despite the deplorable and inhumane conditions there.<sup>230</sup>

The rest is history; as we know, California voters overwhelmingly supported Proposition 2. In fact, more California voters voted yes on Proposition 2 than on any of the other eleven measures on the ballot that day.<sup>231</sup> Overall, when polled, Americans overwhelmingly support reform of our animal treatment laws: three quarters of those polled believe that there should be effective federal law outlawing inhumane treatment of farm animals.<sup>232</sup> More so, the vast majority of Americans believe that there should be federal inspections of U.S. farms to ensure that animals are treated humanely.<sup>233</sup>

## 2. Philosophies of Animal Rights and Ethics

Legal ethicists and philosophers have long contemplated the appropriate framework in which to consider the welfare and rights of animals.<sup>234</sup> Scholars have considered whether animals should have a property status, rights as part of our integrated world, or a different level of rights, and whether more humane treatment will provide animals the respect they deserve.<sup>235</sup> Others, such as Professor Thomas Kelch, have discussed the notion that animals should be given more or less status depending on their level of understanding.<sup>236</sup>

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<sup>227</sup> Howard Blume, *Group Alleges Cruelty to Hens*, L.A. TIMES (Oct. 14, 2008), <http://articles.latimes.com/2008/oct/14/local/me-chickens14> [<http://perma.cc/GL22-HPTF>]; *Undercover at a California Factory Egg Farm*, *supra* note 48.

<sup>228</sup> See Lovvorn & Perry, *supra* note 28, at 156–62.

<sup>229</sup> Vick, *supra* note 144, at 154–55; see Lovvorn & Perry, *supra* note 28, at 161.

<sup>230</sup> *Undercover at a California Factory Egg Farm*, *supra* note 48; see Lovvorn & Perry, *supra* note 28, at 161–62.

<sup>231</sup> Lovvorn & Perry, *supra* note 28, at 167.

<sup>232</sup> *Id.* at 153–54.

<sup>233</sup> *Id.*

<sup>234</sup> See *infra* notes 235–261 and accompanying text.

<sup>235</sup> See Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. CHI. LEGAL F. 137, 173–75; Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 564–69 (1998).

<sup>236</sup> See Kelch, *supra* note 235, at 564–69.

For centuries, humans have indeed been questioning whether, as a starting analysis, they should be eating animals for food.<sup>237</sup> Vegetarianism existed as early as 3200 B.C., and it is believed that renowned philosophers such as Plato subscribed to the theory that it is morally wrong to eat animals.<sup>238</sup> Even if one were to dispense with this first point and start from a place where the eating of animals and animal products is philosophically acceptable and necessary to human health, one's analysis would almost certainly raise the question of what our moral and ethical obligations are to the animals that provide this food.<sup>239</sup>

In 1965, a committee inquiring into animal welfare in the United Kingdom prepared the "Brambell Report," which laid out five freedoms for all animals that are now widely recognized as the international standard upon which we base our treatment of farm animals.<sup>240</sup> They are:

- (1) [F]reedom from hunger and thirst, by ready access to water and a diet to maintain health and vigor;
- (2) freedom from discomfort, by providing an appropriate environment;
- (3) freedom from pain, injury, and disease, by prevention or rapid diagnosis and treatment;
- (4) freedom to express normal behavior, by providing sufficient space, proper facilities, and appropriate company of the animal's own kind;
- and (5) freedom from fear and distress, by ensuring conditions and treatment, which avoid mental suffering.<sup>241</sup>

The British Farm Animal Welfare Council convened in 1979 to advise the government on animal welfare, and in 2009 issued a new report (the "Report") summarizing the status of animal welfare over the last twenty years and laying out a proposed strategy for Britain for the next twenty years.<sup>242</sup> What is so remarkable about the Report and its recommendations is the recognition it evinces: that farm animals ought to be treated in a certain humane manner, a notion that existed as early as 1965 in England.<sup>243</sup> The Report recognizes animals as sentient beings, and that man has a duty to provide for the needs of farm ani-

<sup>237</sup> Rodriguez, *supra* note 1, at 58.

<sup>238</sup> *Id.*

<sup>239</sup> *Meatless Meals: The Benefits of Eating Less Meat*, MAYO CLINIC (Aug. 19, 2014) [hereinafter *Meatless Meals*], <http://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/in-depth/meatless-meals/art-20048193> [<http://perma.cc/6CYW-GJ8U>] (discussing the work of medical experts who do not believe that eating animal protein is best or even necessary for human health).

<sup>240</sup> *Five Freedoms*, FARM ANIMAL WELFARE COUNCIL (Apr. 16, 2009), <http://webarchive.nationalarchives.gov.uk/20121007104210/http://www.fawc.org.uk/freedoms.htm> [<http://perma.cc/F7UX-E9QG>].

<sup>241</sup> *Id.*

<sup>242</sup> FARM ANIMAL WELFARE COUNCIL, *FARM ANIMAL WELFARE IN GREAT BRITAIN: PAST, PRESENT AND FUTURE*, at i, 1 (2009), [http://www.fao.org/fileadmin/user\\_upload/animalwelfare/ppf-report091012.pdf](http://www.fao.org/fileadmin/user_upload/animalwelfare/ppf-report091012.pdf) [<http://perma.cc/WH3H-FY5N>].

<sup>243</sup> *Id.* at 6.

mals.<sup>244</sup> It calls for ethical decision-making and an examination of whether an animal has a good life and/or a life worth living from the animal's perspective.<sup>245</sup>

Animal rights philosophers of the most recent century might generally be said to fall into categories whereby they regard animals as having: equal rights to humans (the animal rights camp); some level of consideration due to them from a utilitarian point of view; or no consideration due them at all under a Kantian ethical point of view. The older "no consideration" view, where our only obligation would be to ensure a humane death, can no longer be considered appropriate or current given what we know about animals and the huge changes in animal husbandry in the last century.<sup>246</sup> Although animals may have in the past lived bucolic lives on family or small farms, or been shepherded on an open range, the majority of today's animal husbandry is quite different. Indeed, farming and animal husbandry have changed drastically from small, local farm utopias to mega factory farms.<sup>247</sup> Thus changed, it has become incumbent upon us to broaden our concern beyond the manner of death to include concern for the manner in which the animal is forced to live.

In his 1975 book *Animal Liberation*, philosopher Peter Singer proposed the moral concept that animals and people ought to be given the same consideration under a utilitarian analysis allowing for "each to count for one and none for more than one," but not be allotted "rights" per se.<sup>248</sup> In a contrasting view, Tom Regan made academic waves in his 1980's essay and book *The Case for Animal Rights*.<sup>249</sup> Regan argued that Singer's analysis turned on how much satisfaction results from certain actions and that this would determine whether these actions were right or wrong.<sup>250</sup> Regan's case for animal rights, in

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 1.

<sup>246</sup> Rodriguez, *supra* note 1, at 58. Under ancient kosher laws, the obligation to treat animals humanely applies specifically to the required killing of the animal in one fast cut to the carotid artery with a smooth knife. HAYIM H. DONIN, TO BE A JEW: A GUIDE TO JEWISH OBSERVANCE IN CONTEMPORARY LIFE 106 (1991); see *Deuteronomy* 12:21; Michelle Hodkin, Note and Comment, *When Ritual Slaughter Isn't Kosher: An Examination of Shechita and the Humane Methods of Slaughter Act*, 1 J. ANIMAL L. 129, 135 (2005). Under the Humane Slaughter Act of modern times, kosher slaughter is indeed recognized as humane. 7 U.S.C. § 1902 (2012). An argument can also be made based upon a reading of the Jewish law that animals must also be treated humanely in all of life. TALMUD BAVLI 32a (Rabbi Hersh Goldwurm et al. eds., Mesorah Publications, Ltd., Schottenstein ed. 1995) (requiring animals to be treated with kindness and compassion); Hodkin, *supra*, at 136–37.

<sup>247</sup> *Meatless Meals*, *supra* note 239.

<sup>248</sup> PETER SINGER, *ANIMAL LIBERATION* 5 (4th ed. 2009).

<sup>249</sup> *Id.*

<sup>249</sup> See generally TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983); Tom Regan, *The Case for Animal Rights*, in *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* 105, 105–14 (Tom Regan & Peter Singer eds., 2d ed. 1989).

<sup>250</sup> Tom Regan, *Why Sex with Animals Violates Their Rights*, ANIMALS VOICE, <http://tomregan.info/why-sex-with-animals-violates-their-rights/> [<http://perma.cc/GCU3-NMGP>].

contrast, rests on the ideal that humans and animals both have fundamental moral rights and should be treated with respect, regardless of whether the consequences of treating animals poorly results in greater overall satisfaction.<sup>251</sup>

Another U.S. scholar Professor Thomas Kelch has proposed what might be considered an alternative view, the notion that animals should not have a property status at all.<sup>252</sup> Our right to control them thus eliminated, Kelch argues that, under the common law, all factors would seem to require a complete re-envisioning of our treatment of animals as property.<sup>253</sup>

At least one philosopher has recently persuasively argued that animals have “at least some moral status” under both utilitarian and rights based animal theories.<sup>254</sup> This view neither assumes that animals have rights nor that they are deserving of a particular level of consideration.<sup>255</sup> Professor David DeGrazia, a philosopher and proponent of this view, makes a strong case that the rights camp and the utilitarian camp have more in common than one might expect.<sup>256</sup> Laying out existing philosophical frameworks and assuming a “weak moral imperative,” Professor DeGrazia makes a strong case for a consumer’s obligation to never buy factory processed animal products.<sup>257</sup> He urges that, barring any concrete assumption about the moral status of animals and without an assumption that animals have rights per se or entitlement to equal consideration, sentient animals have “at least some moral status” and ought not to have to endure the miseries of the factory farm.<sup>258</sup>

Professor DeGrazia goes on to suggest that because vegetarians enjoy and thrive on their diet and are perhaps better off than carnivorous humans, eating animals is unnecessary.<sup>259</sup> From here, he urges that because there is no necessity for raising the animals in the first instance, and animals will endure nontrivial harms on the way to the slaughterhouse and at slaughter itself, it is therefore not even morally defensible to eat animals raised on smaller “family farms.”<sup>260</sup> DeGrazia thus concludes “[o]ne need not be a strong champion of animal protection . . . to embrace moral vegetarianism.”<sup>261</sup>

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<sup>251</sup> *Id.*

<sup>252</sup> See Kelch, *supra* note 235, at 531.

<sup>253</sup> *Id.*

<sup>254</sup> See DeGrazia, *supra* note 205, at 143.

<sup>255</sup> See *id.* at 145.

<sup>256</sup> See *id.*

<sup>257</sup> *Id.* at 159 (urging that people should make “every reasonable effort not to provide financial support to institutions or practices that cause extensive, unnecessary harm”).

<sup>258</sup> See *id.* at 150–54, 160.

<sup>259</sup> See *id.* at 154–56.

<sup>260</sup> See *id.* at 160–64.

<sup>261</sup> *Id.*

### 3. Ethical and Legal Action

Although I personally find the arguments in favor of vegetarianism quite persuasive, the time is ripe for a more practical argument for humane federal legislation in the laying hen industry and beyond.<sup>262</sup> In the context of the existing lack of regulation and abominable conditions on factory farms today, whether one chooses a rights based, utilitarian theory or accepts only the weak proposition that cruelty to animals is wrong, the inhumane treatment of factory farmed hens and other “covered” factory farmed animals must be considered morally and ethically indefensible.<sup>263</sup>

Law Professor Jedidiah Purdy has stated: “We create and control the suffering of animals in [the factory farm setting], and that fact is the prompt for ethical reflection.”<sup>264</sup> Assuming only the very weak moral imperative that animals have some sort of status, there is simply no real argument that it is right to subject animals to a tortuous life, whereby they spend their entire lives in cages in which they cannot stretch their limbs, sit up, or turn around.<sup>265</sup>

New federal legislation should be passed immediately so that we may begin to behave as a civilized society with regard to the animals that produce our food. To embrace this mandate, one only need embrace the simple moral assumption that animals have some moral status; thus, we have a moral and ethical obligation to treat our farm animals humanely.<sup>266</sup> Such humane treatment assumes a painless death, along with the avoidance of unnecessary pain and torture in life.<sup>267</sup> Given the deplorable state of farm animal welfare in this country, this Article is most concerned with, at a bare minimum, urging Congress to pass new federal legislation to ensure basic improvements in our treatment of farm animals.<sup>268</sup>

## VII. OUTLINE OF PROPOSED FEDERAL LEGISLATION FOR FARM ANIMALS

Given developments in state laws and the number of states that have begun to adopt new laws requiring more humane treatment of farm animals, the time has come for federal legislators to act.<sup>269</sup> If legislation is made state-by-

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<sup>262</sup> See *supra* notes 37–73 and accompanying text (detailing the deplorable and inhumane practices currently found commonplace in the hen industry, and in factory farms generally).

<sup>263</sup> See *supra* notes 37–73 and accompanying text.

<sup>264</sup> See Jedidiah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857, 911–12 (2013).

<sup>265</sup> See *id.*

<sup>266</sup> *Contra* DeGrazia, *supra* note 205, at 146 (proposing that “standard mapping of views of animals’ moral status . . . unnecessarily narrow[s] the moral basis for certain appropriate reforms”).

<sup>267</sup> See *id.* at 150 (arguing that animals have moral status, a notion that assumes that it is wrong to cause animals excessive, unnecessary harm).

<sup>268</sup> See *infra* notes 269–279 and accompanying text.

<sup>269</sup> See *supra* notes 121–147 and accompanying text.



state, it will be patchwork and inconsistent, and ultimately cost more to implement.<sup>270</sup> At the outset, Congress should amend and strengthen the Humane Slaughter Act to expressly cover all farm animals, including laying hens, and ensure that slaughter is truly humane and painless.<sup>271</sup> Federally mandated methods of slaughter must be improved and inspections toward compliance with these procedures must be required.<sup>272</sup>

Additionally, Congress should pass new federal legislation to require farmers to treat animals humanely in life, and to expressly prohibit animal cruelty, as there is sadly no current federal legislation that lays out these two simple standards.<sup>273</sup> As a starting point, humane treatment must include providing farm animals with the ability to stand up, turn around and move about freely, to stretch limbs fully, and move at will toward food and water. Federal legislation closely mirroring California's Proposition 2 ("Proposition 2") should be passed so that farm animals have, at a minimum, places to live that allow for stretching, turning and moving, and ready access to food and water.<sup>274</sup> Moreover, all such federal humane farm animal treatment legislative proposals must expressly cover cows, pregnant sows, pigs, calves, and laying hens, but must not exempt any farmed animal in the United States.<sup>275</sup> The penning of pregnant sows and veal calves should also be expressly and immediately outlawed.<sup>276</sup>

Normatively, in the long run, federal legislation would also require that animals have access to the outdoors and contain provisions requiring that farm animals be raised in conditions that allow them to engage in their natural behaviors.<sup>277</sup> In the case of laying hens, for example, enough space should be

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<sup>270</sup> See *supra* note 109 and accompanying text.

<sup>271</sup> See *supra* notes 191–268 and accompanying text.

<sup>272</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO-04-247, HUMANE METHODS OF SLAUGHTER ACT: USDA HAS ADDRESSED SOME PROBLEMS BUT STILL FACES ENFORCEMENT CHALLENGES 4–6, 29–30 (2004), <http://www.gao.gov/new.items/d04247.pdf> [<http://perma.cc/5QJV-YSNR>]; see also TRACY LYNN MCQUIRTER, BY ANY GREENS NECESSARY 35–37 (2010) (noting that slaughterhouse employees report that animals are frequently not even rendered unconscious before they are slaughtered, placed upside down in scalding water, or left to bleed out and suffer butchering alive).

<sup>273</sup> See *supra* notes 95–102 and accompanying text (discussing limited federal laws protecting animals and noting that there is no federal anti-animal cruelty statute). New federal legislation should prohibit intentional animal cruelty and exact stiff civil and criminal penalties for those who do not comply.

<sup>274</sup> See *supra* notes 3–5, 121–127 and accompanying text.

<sup>275</sup> See *supra* notes 139–245 and accompanying text.

<sup>276</sup> See *Pregnant Sow Housing*, AM. VETERINARY MED. ASS'N, <https://www.avma.org/KB/Policies/Pages/Pregnant-Sow-Housing.aspx> [<https://perma.cc/78KY-U2H9>] (describing the benefits of spacious housing for pregnant sows, and endorsing housing that allows adequate quality and quantity of space permitting sows to assume normal postures and express normal patterns of behavior); *Veal Calf Management*, AM. VETERINARY MED. ASS'N, <https://www.avma.org/KB/Policies/Pages/Veal-Calf-Management.aspx> [<https://perma.cc/AX7U-WAFN>] (explicitly endorsing group housing for veal calves).

<sup>277</sup> See Watnick, *supra* note 170, at 10–11 (noting that organic regulations require that animals live in conditions that accommodate their "health and natural behavior").

provided so that they may dust bathe, a behavior hens engage in to keep themselves clean.<sup>278</sup> Providing appropriate amounts of living space would also obviate the need for many of the inhumane and gruesome practices in animal husbandry, including beak trimming for laying hens, painful tail cutting and ear notching, without anesthesia, for hogs, and other such barbaric practices. Finally, transportation methods should keep animals sheltered from the elements, even on the way to slaughter.<sup>279</sup>

## CONCLUSION

California's Proposition 2 ("Proposition 2"), banning the use of battery cages and cages for covered animals that do not allow an animal to sit up, turn around, or extend its limbs, has been called a watershed moment for animal law and a turning point in the way in which we treat farm animals. Battery cages offer a miserable life for the over 300 million intelligent and social laying hens that spend their lives in cramped conditions and often suffer horrible and inhumane deaths due to their confinement. Although there is currently no federal legislation that prohibits animal cruelty or requires humane treatment of laying hens or other farmed animals in their lifetime, a few states have followed California's lead and have begun to pass more humane farm animal legislation.

Proposition 2 and the related Amendment to Proposition 2 issued in 2010, which extended the Proposition's reach to eggs for sale in California regardless of where they were produced, were passed in response to documented abuses in California in the egg laying and other factory farming industries. The law reflects that most Americans support federal legislation that would ban inhumane treatment of farm animals, would require some reasonable level of decent conditions for farm animals, and would require regular federal inspection of factory farms.

In contrast to existing United States law, European Union law requires more humane treatment of laying hens and prohibits the use of battery cages. Likewise, the Organic Foods Production Act requires that organically raised farm animals be given access to the outdoors and that provisions be made for the animals' natural behavior, although the organic regulations contain loopholes.

In general, factory farming has negative effects on the environment and contributes to animal and ultimately human suffering. Farm factory workers suffer accidents and the effects of contaminated air, and often develop antibi-

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<sup>278</sup> Lovvorn & Perry, *supra* note 28, at 151–52; *Providing Suitable Dust Bath Areas for Your Chickens*, VT. FARM HEART (Apr. 19, 2013), <https://vermontfarmheart.wordpress.com/2013/04/19/providing-suitable-dust-bath-areas-for-your-chickens/> [<https://perma.cc/JL2C-LV3M>].

<sup>279</sup> See DeGrazia, *supra* note 205, at 151–53.

otic resistance. Additionally, factory farms pollute surrounding air and water and contribute to the development of antibiotic resistant “superbugs.”

Various frameworks exist for considering the morality of factory farming and battery cages for laying hens, including animal rights based, utilitarian, and Kantian theories. Assuming only that animals have some moral status and that animal cruelty is wrong, one must conclude that factory farming as it exists today is morally unacceptable in a civilized society.

This Article thus urges Congress to amend and strengthen the Humane Slaughter Act to cover laying hens and require more stringent federal inspections, and to pass new federal law modeled after California’s Proposition 2. Additionally, Congress should pass new federal law that goes further, expressly prohibiting animal cruelty and laying out strict penalties where it is found. This morally and ethically sound legislative framework will have the added advantage of avoiding a patchwork of state legislation regarding laying hens and other farm animals, and will in the end inure to the benefit of all those associated with the egg and farming industry, including animals, farmers, workers, and you.